119

No. ____

SUPREME COURT OF THE UNITED STATES

Shantee MAHARAJ, *et al*
Petitioner
v.
Scott E. SOMMER, *et al*
Respondents

PETITION FOR A WRIT OF CERTIORARI
to the Supreme Judicial Court for the Mommonwealth of Massachusetts

APPENDIX

John G.S. Flym, Esq.
85 Bd Suchet, 75016 Paris, France
MA BBO # 172180
j.flym@neu.edu
+33 6 16 18 89 98

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APPENDIX A

Massachusetts Supreme Judicial Court
No. SJC-09855

Dated September 8, 2008

NOTICE OF DENIAL OF PETITION FOR REHEARING

Supreme Judicial Court
for the Commonwealth of Massachusetts
John Adams Courthouse
One Pemberton Square, Suite 1400, Boston,
Massachusetts 02108-1724
Telephone 617-557-1020. Fax 617-557-1145

Dated: September 8, 2RE: No. SJC-09855

SCOTT E. SOMMER, executor
vs.
SHANTEE MAHARAJ, executrix, & another;
Vanguard Fiduciary Trust Company & others, third-party defendants

NOTICE OF DENIAL OF PETITION FOR REHEARING

The petition for Rehearing filed in the above captioned case has been considered by the court and is denied.

Susan Mellen, Clerk

Dated: September 8, 2008

To: Peter S. Brooks, Esquire
John C. Ottenberg, Esquire
John R. Baraniak, Jr., Esquire
Gael Mahony, Esquire
John G. S. Flym, Esquire
Middlesex Superior Court

APPENDIX B

Massachusetts Supreme Judicial Court
No. SJC-09855

Dated July 28, 2008

MAHARAJ'S PETITION FOR REHEARING

John G.S. Flym
Prof.Emeritus
Northeastern University School of Law
400 Huntington Ave.
Boston, MA 02115
617.373.3348
j.flym@neu.edu

July 28, 2008
Via hand delivery

The Honorable Justice John M. Greaney
Presiding Justice
Supreme Judicial Court
One Pemberton Square, Suite 1400
Boston, MA 02108

Re:Sommer v. Maharaj - SJC-09855
Petition for Rehearing;
Suggestion for Rehearing by the full Court

Dear Justice Greaney:

Pursuant to Mass.R.A.P. Rule 27, Ms. Maharaj hereby petitions this Honorable Court to grant a rehearing, and suggests that the case be reheard by the full Court. The points of law and fact which it is contended this Court's opinion dated June 13, 2008,[1]overlooks or misapprehends are:

I. The Superior Court's order directing that a judgment debt be paid from proceeds of the IRAs deprived Maharaj of her property without the due

[1] Hereafter the "6/13 Opinion".

process of law guaranteed by the United States and Massachusetts Constitutions.

A. State law - M.G.L. c. 235 § 34A. This 1990 debtors' protection act provides: "The right or interest of any person in an ...Individual Retirement Account...shall not be attached or taken on execution or other process to satisfy any debt or liability...," with two exceptions - (i) an order concerning divorce, separate maintenance or child support; (ii) an order concerning a monetary penalty or restitution in a criminal case. The statute further provides that, disregarding rollovers, this exemption does not apply to sums deposited into the IRAs within 5 years prior to entry of judgment, which exceed 7% of the debtor's total income for those 5 years. Add. 11. These exceptions do not apply to Maharaj's IRAs. App. 999Y – 999MM.

B. Federal law - Guidry/Patterson/Rousey and 26 U.S.C. § 408. The 6/13 Opinion overlooks 26 U.S.C. § 408 which, together with the trilogy Guidry v. Sheet Metal Workers Pension Plan, 493 U.S. 365 (1990), Patterson v. Shumate, 504 U.S. 753 (1992), and Rousey v. Jackaway, 544 U.S. 320 (2005), place IRAs beyond the reach of judgment creditors, (absent a relevant statutory exception).[2] The statute defines the term "Individual Retirement Account" as "...a trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries, but only if the written governing

[2] Unlike ERISA pension plans which are governed entirely by federal statutes, state Individual Retirement Account provisions, such as M.G.L. c. 235 § 34A, are not preempted by federal law.

instrument creating the trust meets the following requirements:...(4) The interest of an individual in the balance in his account is nonforfeitable." Add. 3. Maharaj's IRAs meet this requirement.

The 2005 Rousey decision confirms Patterson's 1992 observation that the relevant federal statute "...exempts [IRAs] from the bankruptcy estate...." Cf. Orr v. Yuhas, 104 F.3d 612 (3rd Cir. 1997). Deciding that ERISA plan interests are exempt from a bankruptcy estate, Patterson holds that the phrase "applicable nonbankruptcy law," (for purposes of deciding whether a debtor's interest in property is so excludable), is not limited to state antialienation laws.[3] Noting that in Guidry it had "...declined to recognize any exceptions to ERISA's antialienation provision outside the bankruptcy context...(labor union may not impose constructive trust on pension benefits of union official who breached fiduciary duties and embezzled funds)...," Patterson adds: "Declining to recognize any exceptions to that provision within the bankruptcy context minimizes the possibility that creditors will engage in strategic manipulation of the bankruptcy laws in order to gain access to otherwise inaccessible funds," at 764.

Guidry: Guidry was chief executive officer of the Sheet Metal Workers International Association, Local 9, and a trustee of its pension fund. After his conviction for embezzling $377,000 of the union's funds, the union obtained a $275,000 judgment, and the District Court imposed a constructive trust on Guidry's pension benefits, ruling: "In circumstances

[3] E.g. M.G.L. c. 235 § 34A

where the viability of a union and the members' pension plans was damaged by the knavery of a union official, a narrow exception to ERISA's anti-alienation provision is appropriate." The Tenth Circuit affirmed. Overruling the lower courts, Guidry holds:

Nor do we think it appropriate to approve any generalized equitable exception - either for employee malfeasance or for criminal misconduct.... Section 206(d) reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless), even if that decision prevents others from securing relief for the wrongs done them. If exceptions to this policy are to be made, it is for Congress to undertake that task.FN18

FN18. See, for example, § 104(a) of the Retirement Equity Act of 1984, 98 Stat. 1433, 29 U.S.C. § 1056(d)(3) (1982 ed., Supp. V), where Congress mandated that the anti-alienation provision should not apply to a "qualified domestic relations order."

As a general matter, courts should be loath to announce equitable exceptions to legislative requirements or prohibitions that are unqualified by the statutory text. The creation of such exceptions, in our view, would be especially problematic in the context of an antigarnishment provision. Such a provision acts, by definition, to hinder the collection of a lawful debt. A restriction on garnishment therefore can be defended only on the view that the effectuation of certain broad social policies sometimes takes precedence over the desire to do equity between particular parties. It makes little sense to adopt such a policy and then to refuse

enforcement whenever enforcement appears inequitable. A court attempting to carve out an exception that would not swallow the rule would be forced to determine whether application of the rule in particular circumstances would be "especially" inequitable. The impracticability of defining such a standard reinforces our conclusion that the identification of any exception should be left to Congress.

Understandably, there may be a natural distaste for the result we reach here. The statute, however, is clear....

at 376-77

The state and federal statutes prohibiting the seizure of IRAs to satisfy a judgment debt are equally clear, and applicable here.

C. The procedure in Superior Court. Aside from a passing remark that the IRAs "...may be protected by statute...," the 6/13 Opinion overlooks the procedure as it evolved in Superior Court, as well as the ample record evidence that the IRAs are valid and exempt from Sommer's reach. App. 999Y-999MM.

The law requiring IRAs to be nonforfeitable, not Monga's threats, was the Funds' basis for refusing to comply with the 1992 orders directing them to surrender the IRAs, Add. 3, 11. From the outset in 1992, the Funds opposed Ottenberg's demands for the IRAs because, absent evidence of fraud, complying with his demand would be illegal, and Monga would be entitled to seek judicial relief against them, App. 999A-999X. Ottenberg failed to

provide any evidence of fraudulent transfers into the IRAs.

Following the 1994 dismissal of Monga's appeal, Ottenberg in September 1994 brought an action for contempt against the Funds for their refusal to obey the 1992 orders, App. 314-333. Ottenberg's substitute complaint in February 1995 added contract and tort counts; it also added a count joining Monga as a defendant, COUNT XI of which seeks a "Determination of Validity of [the IRA] Accounts ...."[4] See Funds' App. 269. On March 1 and 3, 1995, Vanguard and Founders filed separate motions to dismiss Ottenberg's "Substitute Complaint", Dkt. 299, App. 366-69, 370-72. Vanguard's motion states: "In his Memorandum in opposition to the Motions to Dismiss, the Receiver admits that, under applicable state laws, he can only reach those IRAs if they were fraudulently established or funded. See Receiver's Memorandum [in Opposition to the IRA trustees' Motions to Dismiss] at pp. 8, 10-11; "Receiver's Memorandum in Opposition to the IRA Trustees' Motions to Dismiss," p. 11, 2/17/1995, App. 365. Vanguard and IFTC request that the Court require the Receiver to prove that the IRAs are invalid and can be reached by him, as that determination will be dispositive of all other issues in this case," ¶ 2, App. 366-69. The second paragraph of Founders' motion likewise records, "...the Receiver for the first time concedes that he is not entitled to reach [Monga's IRA funds] ... if the accounts are valid IRAs. The

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[4] On August 12, 1997, well after Monga's death, Ottenberg again requested "... a hearing on the merits..." as to the validity of the IRAs. Substitute Complaint to Effect Turnover of IRA Accounts, (3rd prayer for relief) App. 520.

Receiver admits that valid IRA accounts are 'exempt from the claims of creditors of Mr. Monga.' Receiver's Memorandum at 10." App. 370-72. The only "evidence" in the record is Ottenberg's speculative remark, "... The amount of funds in said IRA accounts is extremely high for someone of Monga's age...," "Receiver's Substitute Complaint to Effect Turnover of Accounts," ¶ 51, 02/17/95, Dkt. 295.0. Funds' App. 269.

As the Superior Court's June 2, 1995 opinion explains in denying the motion for contempt, "...it is represented to the court by defendants that Monga insists that the IRA accounts are exempt from attachment by the Receiver. Until the validity of these claims is determined, any action by defendants exposes them to litigation," App. 418.

Monga died in 1996. When the Superior Court issued its October 8, 1998 decision, (which the 6/13 Opinion affirms), the record evidence showed that the IRAs were funded more than 5 years before the 1991 judgment against Monga - thereby resolving the question whether Ottenberg could produce evidence of fraud, App. 999Y-999MM. Arguing for the Funds before the Appeals Court in 2006, Mr. Baraniak candidly answered Judge Graham's question, admitting the IRAs were untainted by fraud. The record leaves no room for controversy as to the IRAs validity.

Overruling all objections to evidence submitted by the parties, (including uncontroverted documents showing that all deposits into the IRAs were made before 1986), the Superior Court nonetheless

accepted Ottenberg's 1998 theory that Monga could be held to have forfeited his rights to the IRAs before his death in 1996, which therefore did not pass to Maharaj upon Monga's death. The Superior Court concluded that Maharaj could not assert a claim to the IRAs, either for herself or on behalf of Monga's estate. The Superior Court stated that it thus found no need to resolve the issue of the IRAs' validity. Add. 23, p.14.

In refusing to apply federal and state statutes which prohibit the seizure of IRAs to satisfy a judgment debt, the Superior Court deprived Maharaj of her property rights in violation of the due process clauses of the United States and Massachusetts Constitutions.

II. The Superior Court's order purporting to declare that Monga had forfeited his rights to the IRAs, and refusing to consider Maharaj's claim that her IRAs were exempt from seizure to satisfy Monga's judgment debt, deprived Maharaj of her property without the due process of law guaranteed by the United States and Massachusetts Constitutions.

A. The Superior Court's inherent powers. In affirming the Superior Court's refusal to grant Maharaj the "...right to be heard on her claim to the IRA assets...," the 6/13 Opinion overrules the Appeals Court's March 3, 2006 decision remanding the case to Superior Court for a hearing on the merits of Maharaj's claims, Sommer v. Maharaj, 65 Mass.App.Ct. 657 (2006). Relying on the judiciary's inherent powers, the 6/13 Opinion finds this case to be "...the rare example of one involving conduct so

egregious as to warrant the forfeiting of [such] a right to be heard...." The 6/13 Opinion explains the Superior Court's reasoning as follows:

The judge's basis for so doing was that Monga's continued defiance and flouting of court orders "stripped him of all right to assert claims of statutory exemption" for the IRA accounts. He had, in other words, forfeited his right to make any such claims by his continued disobedience. In the judge's view, Maharaj's claim to the IRA accounts, as the beneficiary, derived entirely from Monga. Because Monga had forfeited the right to retain them, nothing remained to pass to her on his death.

Overlooking Degen v. United States, 517 U.S. 820 (1996), a key precedent in the Appeals Court's analysis of the judiciary's inherent powers, the 6/13 Opinion cites a number of cases all but one of which precede Degen, (the one decided in 1998 fails to mention Degen), choosing instead to rely upon Chambers v. NASCO, Inc., 501 U.S. 32 (1991), a 5-4 opinion in which Justice Kennedy authored a dissenting opinion in which the Chief Justice and Justice Souter joined. Five years after Chambers, Justice Kennedy wrote the unanimous opinion in Degen.

Having moved to Switzerland in 1988, Degen did not return to the United States to face a 1989 federal indictment for alleged drug smuggling over the prior 20 years. When he filed an answer in a related civil action, contesting the Government's attempt to forfeit properties allegedly purchased with proceeds from his drug dealings, the District Court struck his

claims and entered summary judgment against him, holding that he was not entitled to be heard in the forfeiture action because he remained outside the country, unamenable to criminal prosecution. Degen reversed, holding that the District Court lacked the inherent power, supposedly based on the "fugitive disentitlement doctrine," to strip Degen of his right to be heard. "A court's inherent power is limited by the necessity giving rise to its exercise," at 829.
As Walsh v. Walsh, 221 F.3d 204 (1st Cir. 2000), explains, Degen essentially discards all but two of five commonly asserted rationales for fugitive disentitlement in civil cases: (i) the risk of frustration in determining the merits of the claim; and (ii) the unenforceability of the judgment. In particular, Degen expressly rejects two other rationales - (1) "indignity visited upon the court," and (2) "deterrence" - holding that disentitlement is too blunt an instrument for advancing those 'substantial' interests. 221 F.3d at 215.

The constitutional basis for Degen appears from two cases upon which it relies, McVeigh v. United States, 78 U.S. 259 (1870), and Hovey v. Elliott, 167 U.S. 409, 413-414 (1897). McVeigh involved a forfeiture proceeding of real and personal property belonging to McVeigh. The court allowed the government's motion to strike the answer filed by his attorney on the ground that, as a resident of Richmond within Confederate lines, McVeigh was a rebel. McVeigh holds:

The order in effect denied the respondent a hearing. It is alleged that he was in the position of an alien enemy...Whatever may be the extent of the disability

of an alien enemy to sue in the courts of the hostile country,... it is clear that he is liable to be sued, and this carries with it the right to use all the means and appliances of defence.
at 267

"A different result," McVeigh notes, "would be a blot upon our jurisprudence and civilization."

Hovey involves the New York Court of Appeals' refusal to give full faith and credit to a District of Columbia Supreme Court judgment rendered against defendants whose answer was stricken for contempt of court. Agreeing with the New York decision, Hovey holds:

The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right to defend an action...is...to convert the court exercising such an authority into an instrument of wrong and oppression....
at 413-14

Following an exhaustive review of precedent, Hovey concludes:

[This review of the authorities demonstrates] the unsoundness of the contention that courts of equity have claimed and exercised the power to suppress an answer, and thereupon render a decree pro confesso...if such power obtained, then the ancient common-law doctrine of 'outlawry,' and that of the continental systems as to 'civil death,' would be a

part of the chancery law...violating the rudimentary conceptions of the fundamental rights of the citizen. at 444

In short, the right to be heard is a fundamental aspect of due process.

Degen adds that it does not decide "...whether enforcement of a disentitlement rule under proper authority would violate due process...," at 828, (emphasis added). Congress responded by enacting CAFRA, (Civil Asset Forfeiture Reform Act of 2000), 28 U.S.C. § 2466 (2000), which authorizes the disentitlement of a fugitive in a criminal prosecution from contesting a related civil or criminal forfeiture action.

B. The Superior Court's action viewed in light of Degen. The 6/13 Opinion states that the Superior Court's refusal to consider Maharaj's claim to the IRAs was based on "...Monga's continued defiance and flouting of court orders...." Indeed, the Superior Court's order dated October 8, 1998, states, "Monga's continued defiance of court orders, right until the time of his death, stripped him of all right to assert claims [to the IRAs]," at p. 14. As characterized in the Appeals Court's 2006 opinion, "The judge's order, striking Maharaj's claim to the IRA accounts, advanced no apparent purpose other than punishment for prior disobedience," at 664.

As appears in footnote 12 of the Superior Court's order, which accompanies the text just quoted from page 14 of the order, the judge applied Monga's IRAs as a substitute source of funds in satisfaction of the

judgment debt. In short, the judge purported to create an exception to the federal and state statutes which forbid the garnishment of IRAs to pay judgment creditors.

In upholding the judge's action, the 6/13 Opinion misapprehends the law by effectively creating an exception to those statutes based on inherent judicial powers. Its reliance on a combination of factors such as deterrence, and punishment further suggest a misapprehension of the law as defined in Degen.[5] As the Appeals Court noted, given the fact that the IRAs were frozen, there was no risk of frustration in determining either their validity or in enforcing a resulting judgment, and its conclusion that forfeiture of the IRAs amounted to nothing other than punishment is evident.

C. The procedure in Superior Court. As the 6/13 Opinion notes, the 1998 order was in response to Ottenberg's motion for summary judgment on his 1995 "amended substitute complaint" which specified, as relief Ottenberg sought, a determination of the IRAs validity. Funds' App. 271. Until Monga died, the IRAs remained his nonforfeitable property, and they passed to his surviving spouse and sole beneficiary, Maharaj, by virtue of law. IRS Publication 590, Add. 5; App. 999NN; App. 999EE, 999LL.

The Superior Court's 1998 decision, purports to undo this 1996 transfer to Maharaj, posthumously

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[5] "Additionally, a sanction imposed for noncompliance with court orders 'serve[s] not only to punish the offending party but also to deter putative offenders in future cases.'"

declaring Monga's forfeiture to the IRAs as of his death in 1996, and characterizing Maharaj's rights as entirely derivative. The Superior Court's 1998 decision begins by refusing to review the validity of prior orders entered in the case, (evidently in response to the voluminous documents submitted by the parties challenging such prior orders), and it makes no relevant new finding.

The 6/13 Opinion thus misapprehends the facts when it suggests that Maharaj herself was guilty of the misconduct which lead to forfeiture of the IRAs. For instance, the suggestion that Maharaj failed to turn over documents or property is based on the assumption that she had relevant material[6] - no such finding was ever made, and the record evidence shows that motions were granted allowing Maharaj, indeed Monga as well, to proceed in forma pauperis. Ottenberg on 8/31/98 filed an Amended Complaint for Contempt against Maharaj individually and as Executrix,[7] claiming that Maharaj failed to obey the receivership order, but when Maharaj appeared to defend, he voluntarily withdrew this Complaint on Sept. 15, 1998, Dkt. ## 433, 442. App. 49. One view of the Superior Court's peremptory action is that it denied Maharaj the benefits of the procedures set forth in Mass.R.Civ.P., Rule 65.3. It seems that the remedial sanctions afforded by Massachusetts rules

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[6] Though the 6/13 opinion quotes from the 1992 order, it excises the phrase "...belonging to the defendants...." It did not, indeed it could not, order the surrender of property belonging to third parties, e.g. members of Maharaj's family – whose assets she managed since 1984. App. 963-968.

[7] Ottenberg had earlier filed similar motions, 2/4/93 and 7/02/98, which were also dismissed.

and statutes, had Ottenberg invoked them, would have been adequate to resolve his claims against Maharaj. The 6/13 Opinion misapprehends the law in allowing the Superior Court to override the procedures mandated by the pervasive Massachusetts statutory sanctions scheme.

This Court is not the appropriate forum for resolving controverted factual issues. The 6/13 Opinion states, "...Maharaj has forfeited her right to pursue her claim to the IRA assets because of the contumacious conduct of Monga, which she facilitated...." Maharaj is entitled to be heard on any claim that she engaged in misconduct. The lack in the record of a decision against Maharaj based on her own conduct is illustrated by the Funds' attempt to rely on Mass.R.Civ.P. 37(b)(2). As the Appeals Court notes, "While the record contains numerous accounts of Monga's disobedience of various discovery orders over the course of the postjudgment proceedings, the judge's memorandum of decision makes only passing reference to such instances, and there is no dispute that Maharaj had produced the documents pertaining to the IRA accounts by the time of the summary judgment proceedings," at 665.

D. Maharaj's status as a defendant. Analogizing dismissal of a complaint to the Superior Court's refusal to hear Maharaj, the 6/13 Opinion overlooks binding authorities which stress the distinction between plaintiff and a defendant - see e.g. McVeigh, supra. The Appeals Court rejected the Funds' reliance on Mass.R.Civ.P. 41(b)(2), noting that it applies only to plaintiffs, and adding:

...In view of the procedural posture of this case, we would reject the application of rule 41 in any event. Apart from the fact that Monga was a defendant in the underlying action, Maharaj's claim that the IRA accounts were exempt from creditors arose in the context of supplemental proceedings, initiated by Sommer, to take possession of Monga's property in satisfaction of the judgment. Even ignoring the labels in the pleadings, Maharaj's claim can only fairly be viewed as a defense to the taking of arguably exempt property. Maharaj was not "in the customary role of a party invoking the aid of a court to vindicate rights asserted against another." Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 210, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958). See generally United States v. Pole No. 3172, Hopkinton, 852 F.2d 636, 643 (1st Cir.1988) (though technically a claimant, property owner's action to recover his property after seizure by the government was more in the nature of a response).

at 664-65

Maharaj was entitled to defend her property. In disentitling her the right to do so, the Superior Court violated Maharaj's rights to due process of law.

E. The Superior Court's posthumous order. Whatever might be the scope of a court's inherent power, the 6/13 Opinion overlooks settled authority against the entry of posthumous judgments. As the 6/13 Opinion notes, the Superior Court's theory was that Maharaj's claims to the IRAs were derivative, and therefore valid only insofar as Monga's claims were valid. The limits on the Superior Court's power

therefore present a separate question concerning Monga. In Massachusetts, prosecutions against deceased defendants are abate. See e.g. Com. v. De La Zerda, 416 Mass. 247, 248 (1993); cf. Durham v. United States, 401 U.S. 481 (1971), Fletcher v. Bryan, 361 U.S. 126 (1959). Whatever ambiguity may be present when the defendant dies when his conviction is on appeal, none is imaginable if death occurs prior to conviction. As a matter of due process, there is no distinction here relevant between the right to liberty and the right to property.

Ottenberg never sought a forfeiture remedy during Monga's lifetime. The notion that he could so after Monga's death offends the most rudimentary notions of due process. The Superior Court's order stripping Monga of his property in the IRAs thus denied Monga his due process rights under the United States Constitution. As executrix of Monga's estate, Maharaj is entitled to claim the benefit of those rights on behalf of the estate.

III. Miscellaneous. Among other issues overlooked or misapprehended in the 6/13 Opinion is the Gosine's trust fund. No theory has been suggested as to why Maharaj's nephew's property could be seized by Ottenberg.

As for the Funds' claim for reimbursement from the IRAs, of costs and attorney fees, the IRA contracts could not be interpreted to allow such extravagant disbursement without violating the condition that the IRAs be nonforfeitable - particularly vis-a-vis their trustees. App. 999K-999X. Any clause purporting to authorize such disbursements would

violate the condition for validity of IRAs that they be nonforfeitable. Add. 3, 11, 21, 22; App. 999K-999X.

Much else might be said, particularly concerning the 6/13 Opinion's factual narrative,[8] but such detail

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[8] For instance, the affidavit submitted by Cathy Brooks on June 10, 1992, before Ottenberg's appointment, shows that the 6/13 Opinion misapprehends what Monga had already disclosed to Sommer concerning the IRAs: paragraphs "b" and "g" of Cathy Brooks' affidavit detail the rollovers of the IRAs from Scudder into Founders and Vanguard. *App.* 161, 162. Ottenberg's Memorandum dated February 17, 1995, concedes the validity of these rollovers. *App.* 362.

Another instance concerns Monga's contempt citation. The 6/13 Opinion emphasizes that Monga's contempt was never purged, but it misapprehends Monga's considerable efforts to do so, his submissions of extensive affidavits with supporting documents, and most of all the fact that, one month after the Appeals Court Sommer I decision, Monga filed his appeal from the Superior Court's denial of his motions to purge the contempt. Monga died waiting for the transcripts needed to prosecute that appeal. *App.* 226-264, 265-266, 286-287 288-292, 293-294, 295-296, 297-305, 309-313, 391-401. Also *App.* 202-208, 669-743.

Yet another involves instances of overreaching: (i) by the Superior Court, as in its orders enjoining Monga from prosecuting his IRA claims in Pennsylvania courts, *Dkt.* ##343, 344, 345, 346, 448; *App.* 39, 51, 1018; or its orders authorizing attachments of Monga's property in an aggregate amount of $3.8 million, (M.G.L. 223 § 42A), *Dkt.##* 97, 98, 99, 100, 123, 124, 147, 148; or authorizing Ottenberg to seize Monga's mail, *App.* 200; (ii) by Ottenberg, for instance in his seizure of computers and downloading confidential information stored therein, *App.* 209-210, 211-2[illegible], 705-11; or (iii) by Cathy Brooks, an attorney, submitting an affidavit of transfers allegedly violating a court injunction, but listing mostly transactions predating said injunction, *App.* 147-160.

Of course, one of the issues left unresolved when *Sommer I* conditionally dismissed Monga's appeal involved the trial court's decision to strike Monga's counterclaim against Sommer, (for breach of fiduciary duties by starting a competing

seems unnecessary to whether or not this Court should grant a rehearing. Hopefully, the two broad due process themes - the IRAs' exempt status and Maharaj's right to be heard - have been adequately presented.

One closing remark, however, seems appropriate: by its silence on the point, the 6/13 Opinion misapprehends the prejudice suffered by Maharaj as a result of Ottenberg's, Sommer's and the Funds' obstinate refusal to honor her rights. If she is right, she has been denied her IRAs for twelve years, during which she has been forced to proceed mostly pro se, and to get by as best she could. The implications of this case for millions of IRA holders in Massachusetts and elsewhere in the United States are clear: if this can happen to Maharaj, it can happen to any of them, especially during economically hard times, thereby undoing the mantle of protection Congress enacted for qualified pension and retirement savings plans.

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firm while Sommer remained a director, officer and shareholder of CORE and Subsurface), in order to avoid a compromise jury verdict. *Sommer I*, See Appellants' Brief, pp. 17-24, in Appeal No 92-P-749, and Appellants' Reply Brief, dated 11/30/92 relying on *Cain v. Cain*, 3 Mass. App. Ct. 467 (1975), among several other cases.

The judgment in Sommer's favor may thus have been tainted, and this may explain the relentless campaign of tactical maneuvers he began immediately after the verdict which had the effect, even if not the main purpose, of making life nearly impossible for Monga, (*App.* 202-208, 226-264, 288-289, 669-743, 702-11), culminating in the receivership and almost immediate liquidation of Monga's businesses, (Ottenberg's 8/20/92 Report), and Ottenberg's additional seizure of Monga and Maharaj's statutorily protected ERISA pension funds valued at $26,840.57 when seized in 1992, *App.* 1246, 1249-50.

For the reasons set forth above, Maharaj prays this Honorable Court to grant her a rehearing.

Respectfully submitted,

"s/John G.S. Flym"
John G. S Flym
c/o M. Costello
32 Woodbourne Road
Jamaica Plain, MA 02130
617.522.3739

(in France)
Flym
85 Bd. Suchet
75016 Paris
+33 1 46 51 01 80

Cc.
Justice Robert J. Cordy
Justice Roderick L. Ireland
Justice Francis X. Spina

Copy by hand:

John Baraniak Jr., Esq.
Peter S. Brooks, Esq.
Gael Mahoney, Esq.
John C. Ottenberg, Esq.

APPENDIX C

Massachusetts Supreme Judicial Court
No. SJC-09855

451 Mass. 615 (2008)

June 13, 2008
Rescript September 25, 2008

OPINION

SCOTT E. SOMMER, executor, [FN1]

vs.

SHANTEE MAHARAJ, executrix, [FN2] & another [FN3]; VANGUARD FIDUCIARY TRUST COMPANY & others, [FN4] third-party defendants.

Middlesex. April 2, 2007. - June 13, 2008.

Present: GREANEY, IRELAND, SPINA, & CORDY, JJ.

Judgment, Satisfaction. Receiver. Practice, Civil, Receiver, Dismissal.

Individual Retirement Account.

CIVIL ACTION commenced in the Superior Court Department on May 8, 1989.

After review by the Appeals Court, the Supreme Judicial Court granted leave to obtain further appellate review.

Peter S. Brooks for the plaintiff.

John C. Ottenberg, pro se.

John R. Baraniak, Jr., for Vanguard Fiduciary Trust & others. Kristin Moody, for Dreyfus Founders Funds, Inc., was present but did not argue.

John G. S. Flym for Shantee Maharaj.

CORDY, J. Paul F. Sommer and D. Dev Monga were business associates with interests in two corporations controlled by Monga. Shantee Maharaj was Monga's wife and an employee of the corporations. In the breach of contract and fiduciary duty litigation (brought by Sommer against Monga and the corporations) underlying this case, a jury returned a verdict in favor of the plaintiff, Sommer, on June 7, 1991. What followed were years of contumacious conduct by the principal defendant at the time, Monga, in an effort to conceal assets and avoid paying the judgment. Seventeen years later, the litigation has survived both of their deaths.

The principal issue before the court is whether the defendant, Shantee Maharaj, individually and as the executrix of the estate of Monga (decedent), [FN5] has forfeited the right to contest the seizure and distribution of funds held in certain individual retirement accounts (IRA accounts) to satisfy the judgment entered against Monga in favor of Sommer. A Superior Court judge allowed the receiver, John C. Ottenberg, to access and distribute the IRA accounts without affording Maharaj the opportunity to contest, as she wished to, the seizure of the accounts, which may be protected by statute from the claims of creditors. On appeal, in 2006, the Appeals Court vacated the judgment insofar as it allowed the receiver to distribute the IRA assets. Sommer v. Maharaj, 65 Mass. App. Ct. 657, 669 (2006) (Sommer II). We granted the application for further appellate review of the receiver and the estate of Sommer and now affirm the judge's decision. [FN6]

1. Background. After receiving a judgment in the amount of $482,904, Sommer set about trying to enforce it. [FN7] As part of that process, he sought and secured a permanent injunction prohibiting Monga and his business corporations from transferring or otherwise disposing of their assets. Maharaj was fully cognizant of that injunction. The injunction had little effect. As recounted in greater detail in prior decisions of both the Superior Court and the Appeals Court, Monga and Maharaj engaged in a seemingly endless series of actions to avoid paying the judgment. [FN8] These actions included extensive commingling and diversion of the corporations' assets, and the concealment of hundreds of thousands of dollars of Monga's assets. [FN9] They also included the harassment of third parties who had relevant financial information sought by Sommer, based on which a second injunction was entered against Monga.

We briefly recount the relevant facts and events that brought the case to its current posture. [FN10] In June and July of 1992, a Superior Court judge entered two critical orders for the purpose of securing assets for the enforcement of the judgment. First, she found Monga in contempt for failing to provide discovery, and for transferring assets in violation of the permanent injunction entered after judgment. In light of Monga's failure to appear to answer on the contempt complaint, she also issued a capias for his arrest. Monga, who had left the jurisdiction, never purged himself of this contempt. Second, based on findings with respect to the conduct of Monga and Maharaj in diverting and concealing assets that ought otherwise be available to satisfy

the judgment, the judge appointed a receiver. The receiver was directed to "collect, receive and take possession and charge of all [the] assets" of Monga and Maharaj. Monga and Maharaj were also ordered "to deliver to said receiver all the property, moneys, stock in trade and effects of every kind and nature . . . in their . . . possession or control, together with all books, deeds, documents, vouchers, and papers relating thereto." It is apparent from the record that neither Monga nor Maharaj delivered any property to the receiver, and, at least during the six years that preceded the receiver's filing of a motion for summary judgment on his amended substitute complaint (in July, 1998), never delivered any records either.

After identifying the IRA accounts, the receiver secured a court order directing that they be transferred to, and held and administered by, him until entitlement to the IRA assets was determined. [FN11] The companies managing the IRA accounts -- Vanguard Fiduciary Trust Company; Vanguard/Morgan Growth Fund, Inc.; Dreyfus Founders Funds, Inc.; and Investors Fiduciary Trust Company (collectively, the fund defendants) -- did not initially turn over the accounts to the receiver, in part because Monga threatened to sue them if they did so. The fund defendants did, however, freeze the accounts and, in 1995, in response to the receiver's complaint to effect turnover of the accounts, filed a counterclaim and a cross claim in interpleader, seeking to be relieved of liability for the accounts. Monga then sued the funds in Pennsylvania, setting off a complex series of proceedings in State and Federal courts in Pennsylvania and Massachusetts,

[FN12] all of which appear to have been eventually dismissed. [FN13]

In January, 1994, Monga's appeal in the underlying breach of contract and fiduciary duty action was decided. The Appeals Court ordered that the appeal be dismissed unless, within sixty days of the issuance of the rescript, Monga surrendered on the outstanding capias and purged himself of contempt. Sommer v. *619 Monga, 35 Mass. App. Ct. 761, 765 (1994) (Sommer I). Monga failed to do so, and in June, 1994, an order of execution was issued pursuant to the underlying judgment. In light of the contempt, of which Monga had not purged himself, the sum of $100,000 was added to the judgment as penalty. On July 8, 1994, a Superior Court judge ordered all creditors to file proof of claims with the receiver by September 15, 1994. Monga appears to have filed three proofs of claim, one for "vacation pay," one for "Internal Revenue Taxes," and a third for "Legal Fees." Neither Monga nor Maharaj filed claims with respect to the IRA accounts which had been ordered turned over to the receiver, but which remained held by the fund defendants, albeit in a frozen state, due to the threat, by Monga, of litigation. As noted above, this threat was realized when the fund defendants sought interpleader relief.

After Monga passed away in 1996, Maharaj, the beneficiary of the IRA accounts, demanded that the fund defendants pay the IRA assets to her. The fund defendants refused, and the IRA accounts were ultimately ordered turned over to the receiver, and then disbursed as part of the receivership estate. The judge's order of October 8, 1998, which allowed the

receiver's motion for summary judgment effecting the surrender of the funds to him, is the subject of this appeal. [FN14]

In ordering that the IRA accounts be transferred to the receiver and ultimately disbursed as part of the receivership estate, the judge refused to consider Maharaj's claim that the IRA assets were protected by statute from the claims of creditors, and therefore could not be reached to satisfy the judgment against Monga. The judge's basis for so doing was that Monga's continued defiance and flouting of court orders "stripped him of all right to assert claims of statutory exemption" for the IRA accounts. He had, in other words, forfeited his right to make any such claims by his continued disobedience. In the judge's view, Maharaj's claim to the IRA accounts, as the beneficiary, derived entirely from Monga. Because Monga had forfeited the right to retain them, nothing remained to pass to her on his death.

In reaching her decision, the judge relied in part on the Appeals Court's decision in Sommer I, supra at 761, in which the Appeals Court ultimately dismissed Monga's appeal from the underlying judgment against him on the basis of his flagrant disobedience of court orders. Because Monga had already, by the time his appeal was heard, disobeyed any number of court orders, was in contempt, and was subject to an outstanding capias for his arrest, the Appeals Court held that [d]epriv[ing him] of the right to pursue an appeal" did not violate either due process or equal protection. Sommer I, supra at 765. The judge, in turn, similarly determined that Monga's, and Maharaj's, actions warranted depriving

Maharaj of the right to assert any claims to the IRA assets. On appeal from that decision, however, the Appeals Court concluded that denying Maharaj's right to a hearing on the merits of her claim to the IRA assets, in reliance on the court's reasoning in Sommer I, was error. Sommer II, supra at 663. In the Appeals Court's view, the issues involving the IRA accounts were not before the court when it decided Sommer I. Further, as the court noted, the right to appeal differs from the right to a trial. Sommer II, supra at 662. The Appeals Court also rejected the fund defendants argument that the trial court has the inherent power to enforce its own orders and to enter a judgment against Maharaj, stating in a footnote that "[t]he cases appear to limit the sanction of default against a defendant to instances of truly egregious conduct . . . ." Id. at 664 n.12. The Appeals Court vacated the judge's order and judgment on receivership and remanded the case for further proceedings.

2. Discussion. We agree with the Appeals Court that the issue of the exempt status of the IRA accounts was not specifically before that court in Sommer I, and that depriving a party of a right to appeal differs from depriving a party of a right to a trial on the merits. [FN15] This case, however, is the rare example of one involving conduct so egregious as to warrant the forfeiting of a right to be heard. We do not take lightly our decision that the actions of Monga and Maharaj lead to such a result -- certainly depriving a party of the right to be heard on the basis of that party's conduct is the most severe of sanctions -- but the extreme facts of this case countenance such a decision.

The Superior Court has, as the fund defendants, the receiver, and Sommer suggest, the inherent power to enforce its own orders, "to manage [its] own affairs so as to achieve the orderly and expeditious disposition of cases." Brockton Sav. Bank v. Peat, Marwick, Mitchell & Co., 771 F.2d 5, 11 (1st Cir. 1985), cert. denied, 475 U.S. 1018 (1986), quoting Link v. Wabash R.R., 370 U.S. 626, 630-631 (1962). It has long been understood that courts have the "power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates." Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991), quoting Anderson v. Dunn, 6 Wheat. 204, 227 (1821). See, e.g., John's Insulation, Inc. v. L. Addison & Assoc., Inc., 156 F.3d 101, 108 (1st Cir. 1998) (discussing court's inherent power to impose sanctions beyond authority granted by Federal Rules of Civil Procedure). That power, to "be exercised with restraint and discretion," Chambers v. NASCO, Inc., supra at 44, includes dismissal of a lawsuit, when justified by a party's extreme conduct.

Among the pertinent considerations in determining whether conduct warrants dismissal are "the severity of the violation, the legitimacy of the party's excuse, repetition of violations, the deliberateness vel non of the misconduct, mitigating excuses, prejudice to the other side and to the operations of the court, and the adequacy of lesser sanctions." Robson v. Hallenbeck, 81 F.3d 1, 2 (1st Cir. 1996). "As a minimal requirement, there must be convincing evidence of unreasonable conduct or delay. A judge should also give sufficient consideration to the prejudice that the movant would incur if the motion [to dismiss] were denied, and whether there are more suitable,

alternative penalties." Monahan v. Washburn, 400 Mass. 126, 128-129 (1987).

Although "dismissal" is not technically what has occurred in this case, the rationale for dismissing a case on the basis of a party's conduct is applicable in this instance where the forfeiture of Maharaj's right to be heard on her claim to the IRA assets is based on the actions of herself and Monga. The conduct at issue here was unquestionably unreasonable. In short, Monga and Maharaj did everything they could to keep Sommer from enforcing the judgment. Court orders were flouted at every turn and their conduct could not have been more deliberate. Further, the prejudice suffered by Sommer, and now his estate, is palpable. Not only was there an extreme delay in payment of the judgment, but the conduct resulted in significant portions of the receivership estate being paid to cover the costs of years of litigation, in numerous courts, reducing the amount available to satisfy the judgment. In the exceptional circumstances of this case, no lesser sanction would be suitable.

Additionally, a sanction imposed for noncompliance with court orders "serve[s] not only to punish the offending party but also to deter putative offenders in future cases." Figueroa Ruiz v. Alegria, 896 F.2d 645, 649 (1st Cir. 1990). Cf. National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643 (1976) ("the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who

might be tempted to such conduct in the absence of such a deterrent"). A decision here that Maharaj has forfeited her right to pursue her claim to the IRA assets because of the contumacious conduct of Monga, which she facilitated, serves not only to sanction that conduct, but also as an indication that such conduct is not to be tolerated.

3. Conclusion. In the extraordinary circumstances of this case, the judge acted within her authority in imposing an extraordinary sanction. If the conduct at issue here does not warrant such a sanction, we are hard pressed to imagine what would.

The October 8, 1998, decision of the Superior Court judge is affirmed in all respects except the portion that permanently enjoins Maharaj from prosecuting the fund defendants in any Federal court. The judgment on receivership is affirmed.

So ordered.

FN1 Of the estate of Paul F. Sommer.

FN2 Of the estate of D. Dev Monga, the original defendant, who died in 1996. Shantee Maharaj, his widow, was eventually appointed the executrix of his estate.

FN3 John C. Ottenberg, receiver of D. Dev Monga; Core Environmental Resources, Inc.; and Subsurface Technologies, Inc.

FN4 Vanguard/Morgan Growth Fund, Inc.; Dreyfus Founders Funds, Inc.; Citadel Service Co., Inc., Investors Fiduciary Trust Company; and Shantee Maharaj.

FN5 We refer to Shantee Maharaj in her dual roles as the executrix of Monga's estate and as an individual defendant simply as Maharaj.

FN6 We affirm all aspects of the Superior Court judge's October 8, 1998, decision and order that is the subject of this appeal, save for that portion of the decision permanently enjoining Maharaj from prosecuting Vanguard Fiduciary Trust Company; Vanguard/Morgan Growth Fund, Inc.; Dreyfus Founders Funds, Inc.; or Investors Fiduciary Trust Company in any Federal court. On this point we agree with the Appeals Court that the judge had no authority to issue such an injunction. Sommer v. Maharaj, 65 Mass. App. Ct. 657, 665-666 n.16 (2006) (Sommer II).

FN7 For details of the underlying dispute leading to the judgment see Sommer v. Monga, 35 Mass. App. Ct. 761 (1994) (Sommer I), Monga's appeal from the judgment, and Sommer II, supra, the decision that led to the application for further appellate review.

FN8 In addition to the Superior Court decision that is the subject of this appeal, see Sommer I, supra, and Sommer II, supra.

FN9 Some of the details of such conduct are set forth in comprehensive affidavits filed in support of Sommer's motion for the appointment of a receiver in July, 1992.

FN10 A complete iteration of their actions, and the numerous proceedings that resulted, in a number of courts, is impractical. The facts detailed in the prior decisions and opinions of the lower courts paint a sufficient, but still only a partial picture. The Superior Court docket in the present action alone includes more than 500 filings.

FN11 The order appointing a receiver was "clarified" on July 6, 1992, specifically to include the transfer to the receiver of the IRA account with the Vanguard Fiduciary Trust Company. Additional orders were entered with respect to other IRA accounts as they were identified.

FN12 After Monga commenced the Pennsylvania action, the funds moved for interpleader in both the Massachusetts and Pennsylvania actions, seeking authorization to deposit the value of the accounts into court and to be relieved of all further involvement.

FN13 In this series of proceedings, sanctions were twice imposed against Monga and Maharaj in the United States District Court for the District of Massachusetts (once in 1996 and again in 1997) for the filing of frivolous pleadings. These sanctions remained unpaid as of October, 1998.

FN14 On August 1, 2000, final judgment entered on the receivership, and the monies were disbursed. The receiver filed a certificate of compliance on September 13, 2000.

FN15 The IRA accounts were, however, among the assets that Monga was originally enjoined from disposing of, transferring, or otherwise alienating. Monga's actions in ignoring the injunction, and in failing to disclose the very existence of the IRA accounts, led to the dismissal of his appeal. The IRA accounts, then, were not so separate from what was happening at the time of Sommer I as the Appeals Court seems to suggest.

APPENDIX D

Massachusetts Supreme Judicial Court
No. SJC-09855

June 12, 2007

MAHARAJ'S POST ARGUMENT LETTER

John G.S. Flym
Prof. Emeritus
Northeastern University School of Law
400 Huntington Ave.
Boston MA 02115
617.373.3348
j.flym@neu.edu

April 18, 2007
(corrected for typographical errors 4/19/07)

Via Hand delivery

The Honorable Justice John M. Greaney
Presiding Justice
Supreme Judicial Court
One Pemberton Square, Suite 1400
Boston, MA 02108

Re: Sommer v. Maharaj - SJC-09855
Postargument letter

Dear Justice Greaney:

This letter addresses issues raised by Attorney Ottenberg's ("Ottenberg") letter dated 4/5/07, by his and other counsel's April 2 oral arguments, and by the Court, providing citations which hopefully the Court will find useful in deciding this case.

1. Ottenberg's letter claims that an order dated 7/7/92 directs Monga to turn over his IRAs.

That document, docket ("Dkt.") 191, actually dated July 6, amends the receivership order of 6/15/92, Dkt. 182, with the judge's marginal handwritten entry "allowed" - the text of the order was evidently drafted by Sommer's attorney. That 6/15 order was supplanted, however, by a new receivership order dated July 8, Dkt. 192, a new order incorporating, among other changes, two new numbered paragraphs as well as references to Envirotech - without any mention of the IRAs. By contrast, on 8/20/92 Vanguard and Founders (the "Funds") were ordered to turn over Monga's IRAs to the receiver, and Ottenberg was ordered to maintain those funds in an IRA account, (the supplanted 6/15 order contains no similar provision).

This court's recent decision in Parker v. Commonwealth, 448 Mass. 1021, 1022 (2007), breaks no new ground in reaffirming that to hold a party in contempt, "...there must be a clear and unequivocal command and an equally clear and undoubted disobedience...," Nickerson v. Dowd, 342 Mass. 462, 464 (1961). There exists no "clear and unequivocal command" to Monga regarding his IRAs. Nor could "an equally clear and undoubted disobedience" be found, unless the Funds' own litigation for years against compliance with the 8/20/92 orders be viewed as contempt of court.

2. During oral argument, Ottenberg asserted: "I would also say that the Appeals Court um has claimed that I conceded somehow that these accounts were exempt. They were not exempt. Under the applicable statute in 1992, in July of 1992, which was the then current version of Chapter 235, Section

34(a), accounts -- the only accounts that were exempt were ERISA-protected accounts."

Both of these assertions are incorrect.

On March 1 and March 3, 1995, respectively, Vanguard and Founders filed separate motions to dismiss Ottenberg's "Substitute Complaint", Dkt. 299, App. 366-69, 370-72. The second paragraph of Vanguard's motion states: "In his Memorandum in opposition to the Motions to Dismiss, the Receiver admits that, under applicable state laws, he can only reach those IRAs if they were fraudulently established or funded. See Receiver's Memorandum at pp. 8, 10-11. Vanguard and IFTC request that the Court require the Receiver to prove that the IRAs are invalid and can be reached by him, as that determination will be dispositive of all other issues in this case," (emphasis added). The second paragraph of Founders' motion likewise records, "...the Receiver for the first time concedes that he is not entitled to reach [Monga's IRA funds] ... if the accounts are valid IRAs. The Receiver admits that valid IRA accounts are 'exempt from the claims of creditors of Mr. Monga.' Receiver's Memorandum at 10."

Nothing in the text of M.G.L.c.235, § 34(a), as adopted in 1990, or amended in 1991, 1992 and 1998, supports Ottenberg's claim that the law exempting IRAs from the reach of creditors changed at any relevant time. See also ROUSEY v. JACOWAY, 544 U.S. 320 (2005) which confirms GUIDRY v. SHEET METAL WORKERS PENSION PLAN, 493 U.S. 365 (1990) and PATTERSON v. SHUMATE, 504 U.S. 753 (1992): valid IRAs are excluded from a bankruptcy

estate and beyond the reach of creditors. GUIDRY set aside a constructive trust imposed on the pension plan of an employee convicted of having embezzled union funds. PATTERSON is emphatic that exceptions, if there are to be any, is a matter for the legislative branch, not the judiciary.

3. The Court asked Ottenberg, "Did you ... ever present any evidence that these IRAs were not exempt?"

Ottenberg replied, "Uh yes ...." There is no basis for this claim. The record, devoid of any "evidence", contains nothing other than Ottenberg's speculative 1995 remark that the "...amount of funds in said IRA accounts is extremely high for someone of Monga's age...," ¶ 51 of "Receiver's Substitute Complaint to Effect Turnover of Accounts," 02/17/95, Dkt. 295.0.

4. The Court asked Flym whether Monga had been enjoined from transferring assets.

On June 12, 1991, (five days after the June 7 verdict, but six days before the June 18 entry of judgment, Dkt. ## 105-109), the trial court endorsed an order permanently enjoining Monga from transferring assets "... other than in the ordinary and usual course of business," ¶ intro. (emphasis added). Paragraph numbered 3 of this June 12 order added: "The injunction will not unduly interfere with the personal or business activities of the defendants, as the injunction only would prohibit the bulk or unusual transfer of assets and would not interfere with the defendants' ability to continue in business." (emphasis added). Monga's transfers were in compliance with this qualified order.

Along with this qualified injunction, on June 12 the trial court also ordered attachments in the amounts of $500,000, $500,000, $700,000 and $700,000 respectively. Dkt. ## 97, 98, 99, 100, 117 (items 2 & 3). A number of additional trustee process attachments were subsequent ordered: August 13, 1991, for $700,000, Dkt. 123, and a bank account, Dkt. 124; September 19, 1991, another bank account, Dkt. 128, and an attachment in the amount of $500,000, Dkt. 129 - (most of these entries are in the handwritten part of the docket sheet); December 19, 1991, "in the amount of $100,000 each," Dkt.## 147, 148.

The docket sheet records Monga's Notice of Appeal on July 26, 1991, (without a Dkt. #).

In addition to the attachments, the trial court allowed Sommer's attorneys to take many depositions. On November 29 and December 31, 1991, Monga sought protective orders against disclosure of confidential information obtained by Brooks from various banks, Dkt.## 145, 151. A few weeks later, Monga sought equitable relief from further discovery grounded, in part, on the fact that Sommer had already secured his judgment, "...by Reaching and Applying my stock in the Companies which is appraised for $1,228,000.00 by the plaintiff's own expert witness at the trial." 1/27/92 Monga Affidavit, p. 11, ¶ 42. Instead, on January 30, 1992, the trial court allowed Sommer's motion to take Monga's deposition, Dkt. 167. Pursuant thereto, Monga turned over 5780 copies of documents on February 7, 1992 - Monga submitted an invoice for

$1,293.50 in copying expenses on March 12, 1992, which Sommer refused to pay. 6/19/92 Monga Affidavit, App. 202-208, ¶ 12 at 205.

The docket is silent for three months from February 1992 until an entry May 21, 1992, "Notice sent to clerk of Appeals Crt that record assembled," (between Dkt. 173-174).

Three weeks later, seven items were filed on Wednesday, June 10, 1992, moving *inter alia* for the appointment of Ottenberg as receiver, Dkt. ## 175-180. Six more items were filed the next Monday, June 15, including a return of service "in hd to Don Behoury, Office Manager Agent in charge of defts, 6/11/92", Dkt. 181, as well as the receivership order appointing Ottenberg, Dkt. #182, authorizing him to seize "... property belonging to the defendants and to Maharaj ...," *Id.* p. 2, ¶ 1, (emphasis added). A *pro forma* capias also issued against Monga, (the entry has no docket number).

Among the seven documents filed on June 10 in support of the receivership motion is an Affidavit by attorney Cathy Brooks which, in paragraph numbered 3, refers to the injunction issued a year earlier, June 12, 1991. This affidavit's first section is entitled "I. Fraudulent Conveyance of Real Estate," comprising five numbered paragraphs which describe assorted transactions - all of them predating not only the 6/12/91 injunction, but also the jury verdict and court judgment: August 21, 1990, (¶ 4); August 21, 1990, (¶ 5); August 31, 1990, September 26, 1990, September 27, 1990, and September 29, 1990, (¶ 6); September 10, 1990 and October 31, 1990, (¶ 7); and

October 31, 1990, (¶ 8). Based upon this affidavit, on June 15, 1992, the trial court endorsed the receivership order submitted by Brooks which, on p.2, ¶ 4), recites a "finding" that "... Monga has fraudulently conveyed his real and personal property to one or more third parties."

The trial court never addressed Monga's detailed affidavits, or their many supporting exhibits, contesting the allegations of fraudulent conveyances set forth in Brooks' affidavits. Nonetheless, those allegations are belied by the fact that on March 13, 1995, Monga was reduced to filing a motion to proceed *in forma pauperis*, (on appeal from the denial of his motion to purge the contempt charge), Dkt. 300; Sommer had 10 days from receiving notice of this motion to respond, *Id.*; on April 3, 1995, Monga's *in forma pauperis* motion was allowed. The allegations of fraud are also belied by the fact that Monga died in 1996 leaving his widow destitute: Maharaj was forced to litigate *pro se*, (she had no experience as a practicing attorney). Since Monga's death, she has largely depended on the charity of friends.

5. The Court also inquired about the nature of the receivership imposed on Monga.

The order dated July 8, 1992, Dkt. 192, provides in paragraph numbered 3 , "... the receiver is hereby ordered ... to conserve and manage the assets of the defendants and EnviroTech, and all of Core's and Subsurface's subsidiaries and to operate the defendants' respective businesses ...." (emphasis added). Ottenberg seized Monga's companies and

home two days after the initial receivership order of June 15. Last year, answering a question by Appeals Court Judge Graham, Brooks stated that in 1989, "... the companies were healthy, prospering and growing rapidly...," (minute 21 of the audio recording). Although the attachments and litigious discovery proceedings must have taken their toll, Ottenberg's July 14, 1992, report states that the three companies he seized were in business, that Subsurface had assets exceeding its debts and leased out a drilling rig which it owned; that, "EnviroTech was actively and substantially engaged in the environmental consulting and testing business, with substantial clients and apparently a substantial volume of business," and that Core provided personnel, equipment and facilities to EnviroTech. Dkt. 192.5, ¶¶ 8-12.

Notwithstanding the companies' solvency and the receivership mandate, Ottenberg recommended liquidation of the companies on the ground that their "...business credibility is obviously damaged by the fact of the Receivership...," and that the companies would be deemed insolvent if the judgment then being appealed was counted among the companies' debts. Dkt. 192.5, ¶ 14. Ottenberg then requests authority to fire the companies' employees and then liquidate Core, Subsurface and Envirotech. Dkt. 192.5, pp. 3-4. The trial court granted these requests by endorsement in the report's margin. Liquidation of the companies did not serve the aim of satisfying the judgment debt. It did, however, eliminate Sommer's local competition.

6. The Court also inquired about the Appeals Court rescript entered February 14, 1994, Dkt. 247, that Monga's appeal would be dismissed unless he surrendered on the capias within 30 days and purged himself of contempt within 60 days.

Monga had repeatedly moved to set aside the contempt judgment - see e.g. entries on 06/23/93, 08/03/93, 08/19/93, 11/04/93, 12/31/93, Dkt. ## 237, 240, 244.1, 245. Monga appealed the Superior Court's denial of his motions to set aside the contempt on February 1, 1994, two weeks before the Appeals Court rescript. After the rescript, on May 2, 1994, Monga requested instructions for purging the charge of contempt, Dkt. 250. On June 3, 1994, the Superior Court declared the judgment final and ordered its execution; it also imposed an additional $100,000 "... penalty assessed by this Court in connection with the plff's previous motion and complaint for contempt ...," (emphasis added), Dkt. 257. On September 20, 1994, Monga filed his notice of appeal and moved that the record be assembled. Dkt. 272, 273. As noted above, Monga's motion to proceed with the appeal *in forma pauperis* was allowed on April 3, 1995, Dkt. 300. Monga died before his appeal could be heard. Entry 09/12/96, Dkt. 357. What the Appeals Court might have decided concerning the issues of contempt or dismissal of the original appeal from judgment is unknowable.

7. Lastly, Mr. Baraniak presented the Funds as mere stakeholders, with a contractual right to recoup their legal expenses from Monga.

The reasons why this is legally incorrect are set forth in Maharaj's Petition for Rehearing filed on March 3, 2006, in the Appeals Court, 2004-P-0591, docket item # 33, which supplements part 7 of "Appellants' Brief" below, pp. 42-45.

Vanguard Associate Counsel Suzanne F. Barton ("Barton") received a copy of the receivership order on October 19, 1992, with a request that Vanguard freeze Monga's account and transfer the funds to Ottenberg. Vanguard refused the transfer but froze the IRA. 12/1/94 Barton Affidavit, ¶¶ 4-5, App. 999E-999H, attached as an exhibit to Vanguard's 3/1/95 motion to dismiss Ottenberg's substitute complaint, Dkt. 299, App. 366-69. Ironically, Vanguard argues that Ottenberg's Substitute Complaint should be dismissed because, "The newly alleged counts for breach of contract and conversion are premised on the Receiver's assertion that he succeeds to the rights of Monga with regard to the IRA accounts." *Id.* at 367, ¶ second. Monga, before he died and Maharaj afterwards, assert(ed) similar claims against Vanguard.

On June 5, 1995, the court, relying "... on the repeated representations of counsel that ... [Monga's IRAs] will remain frozen and will not be dissipated prior to the determination of the validity of the accounts ...," denied Ottenberg's request for a preliminary injunction against the Funds. Dkt 319. Had the Funds not continued for years to voluntarily freeze Monga's IRAs, by 1995 or earlier they likely would have been confronted with having to show cause why they should not be held in contempt - the IRAs' validity would have been settled long ago. The

same result would have obtained had the Superior Court not unlawfully enjoined Monga's Pennsylvania lawsuit; likewise if Ottenberg had gone ahead the contempt charges he repeatedly filed instead of voluntarily dismissing them - thereby avoiding a judicial ruling that his challenge to the IRAs' validity was specious. If there was waiver, it was surely Ottenberg who waived any claim he might have had, before Monga's death, that Monga had waived his rights to the IRAs. Of course, after Monga's death, the IRAs became property of his widow by operation of law, and had the Funds complied with Maharaj's demand that the IRAs be turned over to her, that too would have set in motion the end of litigation over the IRAs' validity.

The Funds' role in prolonging this litigation is evident, and their legal strategy no doubt was designed to serve the Funds' interests. They may have been entitled to do that, but not at the expense of the IRA beneficiaries, (who otherwise would risk the extinction of their IRA under the banner of Funds' protective litigation). The Funds' legal obligations to Monga, transparent in their years of litigation against the receiver, are defined by contract, statute and jurisprudence. Whether "stakeholders" or some other label be used to characterize the Funds' role, nothing supports their claim to reimbursement by Monga and Maharaj for legal expenses they incurred in this case.

Respectfully submitted,

"s/John G.S. Flym"
John G.S. Flym

c/o M. Costello
32 Woodbourne Road
Jamaica Plain, MA 02130
617.522.3739

(in France)
Flym
85 Bd. Suchet
75016 Paris
+33 1 46 51 01 80

Cc.
Justice Robert J. Cordy
Justice Roderick L. Ireland
Justice Francis X. Spina

Copy by hand:

John Baraniak Jr., Esq.
Peter S. Brooks, Esq.
Gael Mahoney, Esq.
John C. Ottenberg, Esq.

[1]In drafting this letter I have sought guidance from the 21 decisions which mention a "postargument letter" uncovered through Westlaw, 17 of them issued by this Court and 4 by the Appeals Court.

[2]This reiterates Ottenberg's assertion in oral argument: "Please keep in mind that in July of 1992 there was a very specific order directed to Mr. Monga and Ms. Maharaj to turn over those funds. They never, ever complied with that order."

[3]Flym relied upon ROUSEY in oral argument before this Court.

[4]Ottenberg goes on, (after disclaiming any concession of the IRAs validity, and claiming a change in the law), "So there was both factual evidence that uh Mr. Monga did not have an IRA, upon wh-- evidence upon which I relied, and in going forward. There was also evidence that there had been a concerted course of conduct to move assets from one name to another name, to shield it in various ways. The real estate, there were mortgages placed on the real estate. There was a homestead exemption placed on the real estate. There were funds flying around the world, in all different names."

[5]Monga complained, "I believe that the plaintiff and his vastly experienced lawyers Cathy and Peter Brooks have a personal agenda to destroy my business, my credibility, my family life and livelihood," *ibid*, at p. 3, ¶ 7, and, "Ms. Brooks has devoted a substantial portion of her 1/17/92 Aff. to maligning me for legitimately trying to protect the continued well being and the viability of the defendants from an onslaught of discovery and trustee attachments even before judgment was entered in this lawsuit," *ibid*, at p. 9, ¶ 31.

[6]Ottenberg was required to post bond in the amount of only five thousand dollars ($5,000.00), Dkt. 183; several other cases in which Ottenberg was appointed receiver ordered him to post bond in amounts at least equal to the judgment.

7The Appeals Court decision here under review remands the case in part for a determination whether Ottenberg seized property belonging to third parties.

8As noted above, the initial June 15, 1992 "Order for Appointment of Receiver," Dkt. 182, was supplanted by a new order dated July 8, 1992, Dkt. 192, authorizing the seizure of EnviroTech.

9The facts surrounding the issuance of a capias herein do not readily lend themselves to a determination of the boundaries of appropriate sanctions under the rule of law for, whatever they may be, Ottenberg's *post mortem* forfeiture invention conflicts with established jurisprudence, however convenient it may have been as a *deus ex machina* to arbitrarily end this case. Nonetheless, it may be worth recalling Mr. Justice Cardozo's analysis of "...principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental...," PALKO v. CONNECTICUT, 302 U.S. 319, 325 (1937), by reference to "... established procedure of Continental Europe ...," *Id.* at 326. In that context, it may also be worth noting that the European Court of Human Rights has found that an appellate court's refusal to decide the merits of a prisoner's appeal on the ground that he had failed to turn himself in violates Article 6.1 of the 1950 "Convention for the Protection of Human Rights and Fundamental Freedoms," (which guarantees the right to an equitable process). Stift v. Belgium, (N° 46848/99), February 24, 2005. Paragraph 30 of Stift, reaffirming prior decisions against other European nations rendered in 1998, 1999 and 2001, explains

that, on the facts of that case, the balance between, on one hand, the need to assure execution of judicial decisions and, on the other, the need to protect rights of access to appellate tribunals and rights of defense, tipped in favor of the latter.

[10]Footnote 1 of this motion states, "... [Ottenberg's] claim that the 'amount of funds in said IRA accounts is extremely high for someone of Monga's age' (Substitute Complaint ¶ 51) cannot serve as the basis for a determination that the IRAs were fraudulently funded."

[11]I would also like to call the Court's attention to the fact that Sommer died in December 2005, and to the pending "Motion to substitute as named appellants the Estate of Paul Sommer and Scott Sommer in lieu of Paul F. Sommer", filed in this Court on November 7, 2006, docket # 9.

APPENDIX E

Massachusetts Court of Appeals,
No. 04-P-0591

65 Mass.App.Ct. 657 (2006),

Dated March 3, 2006

OPINION

65 Mass.App.Ct. 657 (2006)

March 3, 2006

PAUL F. SOMMER vs. SHANTEE MAHARAJ, executrix, [FN1] & another [FN2];
VANGUARD FIDUCIARY TRUST COMPANY & others, [FN3] third-party defendants.

Case No. 04-P-591.

Middlesex. October 14, 2005. - March 3, 2006.

Present: RAPOZA, GRAHAM, & KATZMANN, JJ.

Further appellate review granted, 447 Mass. 1110 (2006).

Employee Retirement Income Security Act. Pension. Retirement. Individual Retirement Account. Receiver. Practice, Civil, Judgment, Dismissal, Moot case. Superior Court, Jurisdiction. Jurisdiction, Personal.

CIVIL ACTION commenced in the Superior Court Department on May 8, 1989.

Following review by this court, 35 Mass. App. Ct. 761 (1994), additional postjudgment motions were heard by Judith Fabricant, J.

John G.S. Flym for Santee Maharaj.

John R. Baraniak, Jr. (Kristin Moody with him) for Vanguard Fiduciary Trust Company & others.

Peter S. Brooks for the plaintiff.

John C. Ottenberg, pro se.

GRAHAM, J. This is an appeal by the estate of D. Dev Monga and the decedent's widow, Shantee Maharaj, from a Superior Court judge's orders allowing a court-appointed receiver to access and distribute their individual retirement accounts to satisfy a judgment entered in favor of Paul F. Sommer, the plaintiff in the underlying shareholder dispute. Although such accounts are generally protected from the claims of creditors, the judge ruled that the decedent and Maharaj forfeited their rights to contest the seizure because they disobeyed an earlier court order to turn over the accounts to the receiver. We vacate the relevant orders and reverse in part.

1. Background. Sommer and the decedent, Monga, were shareholders in two corporations, Core Environmental & Engineering Resources, Inc. (Core), and Subsurface Technologies, Inc. (Subsurface). Their original dispute came to the Superior Court in 1989, when Monga, the companies' founder and controlling shareholder, terminated his business relationship with Sommer and purportedly offered to repurchase Sommer's shares under the provisions of the parties' written agreement. Sommer refused Monga's offer and sued Monga, Core and Subsurface for breach of contract and fiduciary duty. A jury found in Sommer's favor, and judgment entered against Monga, Core and Subsurface on June 18, 1991, in the amount of $478,904.03. Monga and the

companies appealed, but the appeal was eventually dismissed. See Sommer v. Monga, 35 Mass. App. Ct. 761 (1994), cert. denied, 513 U.S. 1169 (1995).
[FN4]

Sommer initiated postjudgment proceedings to discover and secure assets and to enforce the judgment against Monga, Core and Subsurface. To that end, on June 12, 1991, the trial judge issued an injunction prohibiting Monga and the companies from transferring or otherwise alienating their assets other than in the ordinary course of business. Sommer soon learned, however, that Monga and his wife, Maharaj, had been mingling their assets and those of the companies and transferring them beyond Sommer's reach. At the same time, Monga failed to comply with discovery requests and interfered with Sommer's attempts to elicit discovery from third parties. On January 28, 1992, the trial judge granted Sommer's motion for a preliminary injunction, ordering Monga to appear for his deposition, to produce requested documents, to stop harassing third parties from whom Sommer had sought discovery, and to stop filing frivolous and repetitive motions in an attempt to interfere with Sommer's discovery efforts.

Monga's defiance continued nevertheless, and on June 10, 1992, Sommer filed a complaint for contempt and moved for the appointment of a receiver. When Monga failed to appear for a June 15, 1992, hearing on Sommer's complaint, the judge issued a capias for Monga's arrest and entered a judgment of contempt against him. As a result of his failure to surrender to the capias and purge himself

of the contempt, this court dismissed Monga's appeal from the underlying judgment. See Sommer v. Monga, 35 Mass. App. Ct. at 764-765.

Also on June 15, 1992, the judge granted Sommer's request for a receiver, appointing John C. Ottenberg, and instructing him to take control of the defendants' and Maharaj's assets. In his efforts to locate and collect the assets, Ottenberg discovered certain individual retirement accounts (the IRA accounts) in Monga's name. These included an account with Vanguard Fiduciary Trust Company and Vanguard/Morgan Growth Company (Vanguard), and two accounts with Dreyfus Founders Fund and Investors Fiduciary Trust Company (collectively, the fund defendants). Ottenberg also uncovered two accounts in Maharaj's name, one a revocable trust at the Central Cooperative Bank, the other with Fidelity Service Company, both held by Maharaj as trustee for the benefit of her nephew, Adhiraj Deepak Gosine, under the Uniform Transfers to Minors Act, G. L. c. 201A, §§ 1 et seq. [FN5]

Ottenberg obtained an order from the Superior Court requiring the transfer of the IRA accounts to the receivership estate. When neither Monga nor the fund defendants complied, Ottenberg filed a complaint in Superior Court on January 5, 1995, against the fund defendants and Monga, to effect turnover of those accounts. This spawned a new round of legal activity on several fronts. Ultimately, as of June 1, 1995, the fund defendants complied with a Superior Court order to freeze the IRA accounts, pending resolution of the competing claims.

Monga died of cancer on August 23, 1996. Shortly after, Maharaj instructed the fund defendants to pay the funds in the IRA accounts to her, as the named beneficiary on the accounts. The funds refused. Ottenberg then amended his complaint to add Maharaj as a defendant, [FN6] and moved for summary judgment on his claim to recover the funds, as set forth in his August 12, 1997, "Receiver's Amended Substitute Complaint to Effect Turnover of Accounts."

A hearing was held in the Superior Court on September 24, 1998, by which time some twenty motions were before the judge. On October 8, 1998, the judge issued her "Memorandum of Decision and Orders on Pending Motions." In disposing of the various matters before her, the judge declined to reach the merits of the competing claims to the IRA accounts, ruling instead that Monga's estate and Maharaj had forfeited any right to contest their seizure. On August 1, 2000, the judge entered a judgment on receivership, and Ottenberg disbursed the receivership estate. [FN7] Monga's estate and Maharaj filed this appeal.

2. The IRA accounts and due process considerations. On appeal, Monga's estate and Maharaj principally challenge the forfeiture of the IRA accounts. They point to the protections afforded such accounts, firmly established by Federal and State statutes and United States Supreme Court decisional law. As explained by the Supreme Court with respect to pension benefits under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001 et seq. (2000), the prohibition on alienation of

pension benefits, pursuant to 29 U.S.C. § 1056(d)(1) (2000), "reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless), even if that decision prevents others from securing relief for the wrongs done them." Guidry v. Sheet Metal Workers Natl. Pension Fund, 493 U.S. 365, 376 (1990). Thus, the Supreme Court, in Patterson v. Shumate, 504 U.S. 753, 760 (1992), held that a bankrupt debtor's interest in an ERISA-qualified pension plan was to be excluded, pursuant to its anti-alienation provision, from the property of a bankruptcy estate.

Based on these well-accepted principles, Monga's estate and Maharaj argue that public policy and due process protections cut against the judge's denial of their right to litigate the receiver's seizure of the IRA accounts. Ottenberg and the fund defendants have acknowledged that valid IRA accounts, like ERISA pension benefits, would be exempt from the claims of Monga's creditors. See, e.g., G. L. c. 235, § 34A. [FN8] But on appeal, they insist that Monga's and Maharaj's claims to the funds, however valid, were properly forfeited because they flouted the judge's orders.

The judge relied on our analysis in Sommer v. Monga, 35 Mass. App. Ct. at 764-765, in ruling that Monga's defiance of the order to turn the IRA accounts over to the receiver effected a waiver of any right to assert a statutory exemption for those funds. [FN9] It is critical to note, however, that our analysis in Sommer was addressed to Monga's right to press an appeal while persisting in contumacy and

avoiding a capias for his arrest; neither the IRA's exempt status nor the receivership were before the court in that appeal, and that decision does not hold that Monga waived any rights relating to the receivership or collection of the judgment. Long held principles of due process limit the application of that reasoning to Maharaj's right to be heard on the merits of her claim.

In reaching our decision in Sommer, we made clear that dismissing Monga's appeal did not implicate due process concerns. Id. at 764-765. In so stating, we relied in part on National Union of Marine Cooks & Stewards v. Arnold, 348 U.S. 37, 41, 44-45 (1954), in which the Supreme Court, dismissing the appeal of a party in contempt, was careful to distinguish the right to an appeal, which is a creature of statute, from the right to a trial, which derives from the due process clause of the United States Constitution. Id. at 41-42. With respect to the latter, the Supreme Court referenced the seminal case of Hovey v. Elliott, 167 U.S. 409 (1897), with an explanation that bears repeating:

"The constitutional objection raised by petitioner was long ago considered in Hovey v. Elliott, 167 U.S. 409. In that case, the Supreme Court of the District of Columbia went further and attempted to deprive a defendant of his right to answer the suit brought against him. Having stricken defendant's answer, the court entered judgment against him as a punishment for his refusal to deliver to a court-appointed receiver certain funds which were the subject matter of the litigation. When the State of New York later refused to honor that judgment, this

Court, in affirming the action of the Court of Appeals of New York, held that the District of Columbia had deprived defendant of his property without due process of law by denying him his constitutional right to a day in court."

National Union of Marine Cooks & Stewards v. Arnold, 348 U.S. at 41-42. See Hammond Packing Co. v. Arkansas, 212 U.S. 322, 350 (1909) (Hovey prohibited a denial of the right to defend as a "mere punishment" for the defendant's refusal to follow a court order to pay disputed sums into court). Our Supreme Judicial Court acknowledged the principle in Campbell v. Justices of the Superior Court, 187 Mass. 509, 510-511 (1905), citing Hovey v. Elliott, supra, for its holding that the denial of a defendant's right to present his defense because of a contempt would be a taking of property without due process of law. [FN10]

Our decision in no way undermines the basic principle that a party may forfeit his or her right to an appeal where he or she does not purge himself or herself of contempt. The subject of the instant appeal, however, deals with receivership issues that arose after this court's decision in Sommer v. Monga, supra. Review of the litigation reveals that those issues were indeed viewed as separate and distinct from the litigation that resulted in our 1994 decision. Indeed, the Superior Court judge's June 1, 1995, decision on the receiver's request for a preliminary injunction noted that the receiver had filed a substitute complaint seeking a determination "whether the various mutual fund IRA accounts are valid IRA accounts and, as such, allegedly exempt

from attachment by creditors." We conclude that the denial of Maharaj's right to a hearing on the merits, in reliance on our reasoning in Sommer v. Monga, 35 Mass. App. Ct. 764-765, was error.

The fund defendants offer alternative grounds to justify the judge's action, none of which we find persuasive on this record. They point to the trial court's inherent power to enforce its own orders. It is widely recognized, however, that the court's inherent power to strike a defense and enter judgment against a defendant "is limited by the necessity giving rise to its exercise." Degen v. United States, 517 U.S. 820, 829 (1996). [FN11] See Yousif v. Yousif, 61 Mass. App. Ct. 686, 689 (2004). Here, the judge pointed to Monga's "continued defiance" in refusing to turn over the IRA accounts as the reason for denying Maharaj the opportunity to present a defense to the application of those accounts toward the underlying judgment. But the record indicates that the IRA accounts, as of June 1, 1995, had been frozen by the fund defendants, and that, by the time of the hearing in 1998, Maharaj had provided discovery regarding the accounts. Compare Yousif v. Yousif, supra at 690-691 (dismissal of the husband's appeal warranted because his flight from the jurisdiction seriously impaired the wife's ability to collect on her judgment). [FN12] The judge's order, striking Maharaj's claim to the IRA accounts, advanced no apparent purpose other than punishment for prior disobedience. [FN13]

The fund defendants additionally refer us to Mass.R.Civ.P. 41(b)(2), 365 Mass. 803 (1974), which permits a judge to dismiss an action when a plaintiff

fails to prosecute his or her claim or to comply with a court order. By its express language, [FN14] rule 41(b)(2) applies only to a litigant in the role of a "plaintiff." In view of the procedural posture of this case, we would reject the application of rule 41 in any event. Apart from the fact that Monga was a defendant in the underlying action, Maharaj's claim that the IRA accounts were exempt from creditors arose in the context of supplemental proceedings, initiated by Sommer, to take possession of Monga's property in satisfaction of the judgment. Even ignoring the labels in the pleadings, Maharaj's claim can only fairly be viewed as a defense to the taking of arguably exempt property. Maharaj was not "in the customary role of a party invoking the aid of a court to vindicate rights asserted against another." Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 210 (1958). See generally United States v. Pole No. 3172, Hopkinton, 852 F.2d 636, 643 (1st Cir. 1988) (though technically a claimant, property owner's action to recover his property after seizure by the government was more in the nature of a response).

A final justification offered by the fund defendants for striking Maharaj's claim is Mass.R.Civ.P. 37(b)(2), as amended, 390 Mass. 1208 (1984), for failure to comply with the judge's discovery orders. While the record contains numerous accounts of Monga's disobedience of various discovery orders over the course of the postjudgment proceedings, the judge's memorandum of decision makes only passing reference to such instances, and there is no dispute that Maharaj had produced the documents pertaining to the IRA accounts by the time of the

summary judgment proceedings. [FN15] Again, to avoid running afoul of due process protections, "the sanction must be specifically related to the particular 'claim' which was at issue in the order to provide discovery." Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 707 (1982). In these circumstances, Monga's earlier recalcitrance in providing discovery about his assets would not support the judge's decision to strike Maharaj's claim to the IRA accounts in 1998.

Based on the foregoing, we find erroneous that portion of the judge's October 8, 1998, order forfeiting Maharaj's right to challenge the seizure of the IRA accounts, and we remand the case to the Superior Court for a hearing on the merits of her claim that the IRA accounts were valid and statutorily protected from Monga's creditors. But we affirm the judge's dismissal of the fund defendants from any further proceedings in the Superior Court on the matter. [FN16] Nothing in our decision changes the fund defendants' entitlement to their fees and expenses, to be paid from the IRA accounts. Those awards were grounded in the respective custodial agreements entered into between Monga and the fund defendants at the time he established those accounts. [FN17], [FN18]

3. Jurisdictional matters. Maharaj insisted throughout the postjudgment proceedings that the Superior Court lacked personal jurisdiction over her, fashioning her submissions to the trial court with the designation "special appearance." The judge disagreed, ruling that the court's jurisdiction over Maharaj was established by her inclusion in the 1992

receivership orders. On appeal, Maharaj continues to object to personal jurisdiction, pointing out that she was never named a party, never received service of process, and moved to Florida one and one-half years before the 1992 order was issued appointing the receiver.

The record overwhelmingly establishes the Superior Court's jurisdiction over Maharaj. Pursuant to Mass.R.Civ.P. 65(d), 365 Mass. 834 (1974), [FN19] a nonparty who is aligned with a party, whether as an agent or employee or through participation with a party, may be subject to the directives of an injunction so long as he or she received actual notice of the order. Maharaj does not dispute that she had actual notice of the June 12, 1991, injunction prohibiting the disposal of the assets of Monga and the companies. Maharaj was present at the trial, and she functioned as Monga's law clerk throughout the proceedings. Her affidavit stated that she herself went to Superior Court on July 17, 1991, to obtain copies of the judge's orders. As to her active concert and participation with Monga, the record is replete with evidence, which is no longer open to dispute, [FN20] concerning their jointly held properties and bank accounts and the ongoing mingling and dispersing of their assets and those of the companies after the injunction was issued. Monga himself described Maharaj as a "key employee" of Core and Subsurface, and the record demonstrates that she continued to draw significant amounts of money from the bank accounts of those companies after the injunction was issued. Based on those facts alone, Maharaj came within the injunction's reach.

Because the record makes clear that Maharaj aided and abetted Monga in disobeying the injunction, Maharaj became "liable to the same process for enforcing obedience to the order as if [she] were a party" pursuant to Mass.R.Civ.P. 71, 365 Mass. 837 (1974). [FN21] See Bird v. Capital Site Mgmt. Co., 423 Mass. 172, 178-179 (1996). See Reporters' Notes to Mass.R.Civ.P. 71, Mass. Ann. Laws, Rules of Civil Procedure, at 466 ("An order against such a person may be enforced by the same methods as if the person were a party"), citing 12 Wright & Miller, Federal Practice & Procedure 82 (1973). Issuance of the receivership orders was the judge's remedial response to Monga's and Maharaj's repeated violations of the injunction. As a consequence, the judge's findings of Maharaj's complicity with Monga's course of conduct, and Maharaj's contacts with the proceedings in the Superior Court, established personal jurisdiction over her sufficient to support her inclusion in the receivership orders. See Azarian v. Ettinger, 13 Mass. App. Ct. 1077, 1077-1078 (1982).

For much the same reason, however, we reject Sommer's contention that Maharaj lacked standing to pursue this appeal under the usual rule that only a named party may appeal. Maharaj was expressly named in the receivership orders and had a direct interest in the IRA accounts as the named beneficiary. See, e.g., Dopp v. HTP Corp., 947 F.2d 506, 512 (1st Cir. 1991) (nonparty appellant allowed "when a lower court specifically directs an order at a non-party or enjoins it from a course of conduct"); United States v. Kirschenbaum, 156 F.3d 784, 794 (7th Cir. 1998) (defendant's wife, a nonparty who did

not intervene in the trial court, had standing to appeal an injunction that froze assets in her name). See also Corbett v. Related Cos. Northeast, Inc., 424 Mass. 714, 718 (1997) (appeal permitted in rare instances where nonparty "has a direct, immediate and substantial interest that has been prejudiced by the judgment, and has participated in the underlying proceedings to such an extent that the nonparty has intervened 'in fact' "). [FN22]

Ottenberg, for his part, asserts that the appeal is moot and that we should decline to exercise appellate jurisdiction because Monga failed to obtain a stay pending appeal, the receivership estate was disbursed in 2000, and the receiver was discharged; hence, no funds remain from the IRA accounts should their validity be proven on remand. For this, Ottenberg relies primarily on an unpublished bankruptcy decision from the United States Court of Appeals for the Tenth Circuit, which, by its own terms, has no precedential value.

The United States Court of Appeals for the First Circuit has explained that, at least in the bankruptcy context, "[t]he failure to obtain a stay is not sufficient ground for a finding of mootness." Rochman v. Northeast Util. Serv. Group (In re Public Serv. Co. of N.H.), 963 F.2d 469, 473 (1st Cir. 1992). This is true even if the absence of a stay results in consummation of a reorganization plan prior to resolution of the appeal. See Institut Pasteur v. Cambridge Biotech Corp., 104 F.3d 489, 491 (1st Cir.), cert. denied, 521 U.S. 1120 (1997). Rather, "[t]he case is moot if the requested relief would be either inequitable or impracticable in light of the change in

circumstances." Rochman v. Northeast Util. Serv. Group (In re Public Serv. Co. of N.H.), 963 F.2d at 473 (footnote omitted). Significant among those circumstances would be the extent to which funds were distributed to third persons or to parties that are no longer within the court's jurisdiction. Id. at 475. See Hicks, Muse & Co. v. Brandt (In re Healthco Intl., Inc.), 136 F.3d 45, 48-49 (1st Cir. 1998) (test of mootness of appeal from bankruptcy order was not met where there was no showing that distributions "could not be recovered with relative ease"). Compare Rochman v. Northeast Util. Serv. Group (In re Public Serv. Co. of N.H.), 963 F.2d at 475 (appeal dismissed as moot where setting aside reorganization plan would involve $1.5 billion in financing arrangements and affect "many thousands of innocent third parties").

The same considerations should hold true in the case of an appeal from the outcome of receivership proceedings. See Matter of the Receivership of Harvard Pilgrim Health Care, Inc., 434 Mass. 51, 59 n.11(2001) (rejecting contention that the appeal was moot because the receivership had been terminated and the plan already implemented). Since the bulk of the assets from Monga's receivership estate were distributed among relatively few parties, most of whom, it appears, remain within the trial court's jurisdiction, we do not view the relief that may result on remand as so inequitable or impracticable as to render the appeal moot. See generally Hayes v. Lichtenberg, 422 Mass. 1005, 1006 (1996) (husband's appeal from a modification judgment that was subsequently terminated did not render his appeal moot, since he intended to seek repayment of monies

he paid to wife under the judgment prior to its termination).

Conclusion. We vacate the order, entered October 8, 1998, and judgment on receivership, entered August 1, 2000. The case is remanded to the Superior Court for further proceedings and entry of such orders as are in accordance with this opinion.

So ordered.

FN1 D. Dev Monga was originally named as a defendant; after his death in 1996, Maharaj eventually was appointed the executrix of his estate. See note 6, infra.

FN2 John C. Ottenberg, receiver of D. Dev Monga and Core Environmental & Engineering Resources, Inc. Ottenberg was appointed receiver in 1992, after judgment entered against the originally named defendants in 1991.

FN3 Vanguard/Morgan Growth Fund, Inc.; Dreyfus Founders Funds, Inc.; Citadel Service Co., Inc.; Investors Fiduciary Trust Co.; and Shantee Maharaj.

FN4 See our discussion, infra.

FN5 As of June, 1998, the IRA accounts had a total value of approximately $170,000. Maharaj's trust accounts totaled approximately 7,000 when they were turned over to the receiver in 1992.

FN6 Edmund J. Brokans was the original administrator of Monga's estate, but was replaced by Maharaj.

FN7 Of the $214,750.54 remaining in the receivership estate, Ottenberg distributed amounts as follows: $60,000 to Brooks & Lupan, Sommer's attorneys; $12,000 to Choate, Hall & Stewart, the fund defendants' attorneys; $43,265.55 to the receiver's law firm (according to Monga's estate and Maharaj, Ottenberg's firm was paid a total of $147,000 over the course of the receivership); and the remaining funds to Sommer.

FN8 Chapter 235, § 34A, as appearing in St. 1998, c. 374, § 1, provides, in relevant part: "The right or interest of any person in an annuity, pension, profit sharing or other retirement plan subject to the federal Employee Retirement Income Security Act of 1974 . . . shall be exempt from the operation of any law relating to insolvency and shall not be attached or taken on execution or other process to satisfy any debt or liability of such person."

FN9 For simplicity's sake, when we refer to Maharaj's claim to the IRA accounts we include the claim of Monga's estate.

FN10 The case of Goya Foods, Inc. v. Unanue-Casal, 275 F.3d 124 (1st Cir.), cert. denied, 537 U.S. 1002 (2002), relied upon by the receiver and fund defendants here, involved dismissal of an appeal in response to the defendants' flight from the jurisdiction to avoid a money

judgment against them. It is not instructive regarding the denial of a right to trial on the merits.

FN11 Degen involved the application of the fugitive disentitlement doctrine, the analysis of which was subsequently codified in the Civil Asset Forfeiture Reform Act of 2000, 28 U.S.C. § 2466 (2000).

FN12 The cases appear to limit the sanction of default against a defendant to instances of truly egregious conduct, most typically for fraud on the court in the form of falsifying or destroying evidence. See, e.g., Brockton Sav. Bank v. Peat, Marwick, Mitchell & Co., 771 F.2d 5, 11-12 (1st Cir. 1985), cert. denied, 475 U.S. 1018 (1986).

FN13 The judge relied on the same reasoning to rule that Maharaj waived her right to defend against seizure of two accounts she held as trustee for her nephew. Based on our holding above, the judge could not properly deny Maharaj a hearing on the merits of the validity of those trust accounts, merely as punishment for her failure to turn over the trust accounts voluntarily.

FN14 Rule 41(b)(2) provides, in relevant part: "On motion of the defendant, with notice, the court may, in its discretion, dismiss any action for failure of the plaintiff to prosecute or to comply with these rules or any order of the court."

FN15 In fact, the record indicates that the receiver had withdrawn his earlier motion for sanctions against Monga under rule 37(b)(2) by the time of the summary judgment proceedings.

FN16 The judge also permanently enjoined Maharaj from "instituting or prosecuting against Vanguard, [Investors Fund Trust Company], or any of them, any proceeding in any [S]tate or United States court or administrative tribunal regarding the Monga IRA accounts." Maharaj maintains that the judge, sitting in a State court, lacked authority to issue injunctions restraining further actions against the fund defendants in Federal courts. On this point, the law is well-established in Maharaj's favor, and none of the appellees appear to contend otherwise. See, e.g., Donovan v. Dallas, 377 U.S. 408, 412-414 (1964); General Atomic Co. v. Felter, 434 U.S. 12, 16 (1977). The language in the judge's order enjoining Maharaj from filing suit in Federal court is to be struck.

FN17 Article VI, § 6.3, of the Vanguard IRA Custodial Agreement, and Article 8 of the Investors Fiduciary Trust Company IRA Custodial Agreement, provided that custodial fees and reasonable expenses incurred in managing the accounts could be charged to the account.

FN18 We dispose of the remaining issues raised on appeal concerning the receivership estate as follows: Maharaj argues that there was no basis for the Superior Court judge's order for the liquidation of Core and Subsurface in 1992. Our review of the record found ample support for the judge's order, given Monga's extended absence from the jurisdiction, and the companies' weak financial picture and uncertain prospects. Maharaj also claims that the judge erred in discharging Ottenberg because he failed to file annual reports with the

Superior Court for the years 1996-2000, as required by Mass.R.Civ.P. 66, 365 Mass. 834 (1974). It appears from the record that this issue was not preserved for appeal.

FN19 Rule 65(d) provides, in relevant part: "an injunction or restraining order . . . is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."

FN20 The brief of Monga's estate and Maharaj acknowledges that "for purposes of this appeal, the default contempt order is taken as established."

FN21 Rule 71 provides, in relevant part: "when obedience to an order may be lawfully enforced against a person who is not a party, he is liable to the same process for enforcing obedience to the order as if he were a party."

FN22 We also disagree with Sommer that the appeal should be dismissed under the principles of Goya Foods, Inc. v. Unanue-Casal, 275 F.3d at 128 (appeal dismissed under the fugitive disentitlement doctrine). In that case, unlike Maharaj here, the appellants remained fugitives at the time of the appeal.

APPENDIX F

AppealsCourt of Massachusetts

No. 2004-P-0591

March 20, 2006

APPELLANTS' PETITION FOR REHEARING

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

No. 2004-P-0591

THE ESTATE OF D. DEV MONGA
SHANTEE MAHARAJ
Appellants

v.

PAUL F. SOMMER
SOMMER ENVIRONMENTAL TECHNOLOGIES, INC.,
JOHN C. OTTENBERG, Receiver,
VANGUARD FIDUCIARY TRUST COMPANY
VANGUARD/MORGAN GROWTH FUND, INC.
FOUNDERS FUNDS, INC.
INVESTORS FIDUCIARY TRUST COMPANY
Appellees

APPELLANTS' PETITION FOR REHEARING

Letter to the Hon. Phillip Rapoza
Justice of the Massachusetts Appeals Court

Dear Justice Rapoza:

Pursuant to Mass.R.A.P. Rule 27, 1, John G.S. Flym, ("Flym"), attorney for the above-named appellants, hereby pray this Honorable Court to grant a rehearing in the above-captioned case with respect to certain significant points of law or fact which I believe the court's March 3, 2006 opinion (hereafter the "Court's Opinion") overlooked or misapprehended.

A. Vanguard's fees and expenses.

This Court's Opinion remands the case to the Superior Court for a hearing on the merits of Maharaj's claim that the IRA accounts were valid and statutorily protected from Monga's creditors. However, it affirms dismissal of the fund defendants from any further proceedings, as well as the award to Vanguard of fees and expenses payable from the IRA accounts.[9]

1. The court below awarded fees on the assumption that Maharaj had no valid claim to the IRAs.

Counsel for the funds,[10] as well as receiver Ottenberg,[11] have long conceded that, absent

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[9] As the Fund Appellees Opposition Brief, footnote 14, makes clear, the trial court awarded $92,000 in attorneys' fees and costs to Vanguard - Founders did not seek reimbursement.

[10] Nearly 14 years ago, Vanguard's counsel wrote the first of a series of letters resisting Ottenberg's demand that the IRAs be turned over to him, absent evidence of fraud. (See Appellants' Reply brief, pp. 10-12; and App. 999E-999H. Counsel Barton enclosed a copy of the Vanguard's IRA Agreement stating that, "Article 8.4 of the Agreement provides that the Monga IRA shall be governed by Pennsylvania law." Barton further stated,

evidence of fraud, the IRAs are valid. Responding to a question by Justice Graham at the time of oral argument before this Court last October, John Baraniak, Esq., counsel for the funds, conceded that there is no evidence of any fraudulent conveyance into the Monga IRAs. There is thus little doubt that the IRAs are valid, and that Maharaj will prevail below on the merits of her claim to the IRAs. It is inconceivable how an award of legal fees to the funds, payable from the Maharaj's statutorily protected retirement savings, could be justified.**12**

2. The general rule against awarding legal fees.

"As you know, Pennsylvania law prohibits attachment of IRA assets." See App. 999C. On June 30, 1994, Vanguard Counsel Paul F. Gallagher reaffirmed this position, telling Ottenberg:

> In reviewing our file I have not come across anything that would cause us to change the position that was set forth in Ms. Barton's correspondence to you of October 5, 1992. Namely, that jurisdiction as to the question of whether Mr. Monga's IRA assets are attachable lies with Pennsylvania courts. Accordingly, we must decline your request to transfer assets to you.

adding, "... we can only take such action if we are ordered to do so by a Pennsylvania court ...." (App. at 999D).

[11] On 8/17/95, Ottenberg filed his Opposition to Vanguard, IFTC and Founders' Motions to Dismiss his Complaint, ¶ 1 of which asks the court to "... determine the [IRAs'] rightful possession and ownership ...." Ottenberg's accompanying memorandum concedes that he can only reach the IRAs if they were fraudulently established or funded. "Receiver's Memorandum in Opposition to the IRA Trustees' Motions to Dismiss," at pp. 8, 10-11.

[12] A total of nearly $300,000 was awarded - $147,000 to the receiver, $92,000 to the funds, and $60,000 to Sommer's counsel Brooks. Lacking Ottenberg's annual reports, the sources of these payments remain unclear.

The general rule is "...to prohibit recovery of attorney's fees and expenses in a civil case in the absence of either an agreement between the parties, or a statute or rule to the contrary...," Preferred Mut. Ins. v. Gamache, 426 Mass. 93, 95 (1997).

3. The general rule is for awarding legal fees, if at all, against the losing party.

The general rule is illustrated by Mass.R.A.P. Rule 26, "...if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered ...." Thus, if Vanguard is entitled to recover litigation expenses related to the IRAs, that would have to be against the losing parties, Sommer, Brooks and/or Ottenberg, each of whom prolonged the dispute about the IRAs for over a decade without a shred of evidence to support their position. As early as 1992 when Vanguard's in-house counsel Barton refused to hand over the IRAs, these appellees knew that, absent evidence of fraud, they had no claim to the IRAs.

4. Vanguard's contract does not authorize the award of legal fees payable from the IRA.

Footnote 17 of the Court's opinion misapprehends the language of Vanguard's contract with Monga, Article VI, § 6.3 of which simply provides:

... reimbursement for all reasonable expenses incurred by it in the management of the Account ...

App. 999N

By contrast, Article VIII, ¶ 8 of Founders' contract explicitly provides:

... expenses incurred by the Custodian with respect to ... any controversies concerning the Custodial Account, including, but not limited to, fees for legal services rendered by the Custodian and related costs ...

App. 999R, (emphasis added)

At most, Vanguard's contract might be viewed as ambiguous, but it is hornbook law that such ambiguities are interpreted against the drafter: These are prototypical contracts of adhesion, in which Monga had no possibility of negotiating the terms of his contracts with either fund.

The more plausible reading is that Vanguard, (a Pennsylvania company), was well aware that it might have adopted a provision such as the one set forth in Article VIII, ¶ 8 of Founders' (a Missouri company) contract and, for its own reasons, chose not to do so. As of 2003 Vanguard's website advertised, under its "Plain Talk" heading,[13] the distinctive advantage its low operating expenses offers to investors:

... Management expenses, which are one part of operating expenses, include investment advisory fees as well as other costs of managing a fund — such as account maintenance, reporting, accounting, legal, and other administrative expenses ....

(emphasis added)

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[13] See attached Affidavit of Michael costello.

In short, Vanguard's litigation expenses are included in its management expenses, which are to be paid from gross income. Any doubt on this question should be resolved in Maharaj's favor.

5. The funds broke their contracts with Monga and Maharaj.

In the circumstances of what occurred below, awarding fees to the funds, payable from Maharaj's IRAs, would add insult to injury. The funds' 1992-1995 correspondence with the receiver establishes the fact that their duty was to resist any effort on the part of creditors to reach the IRAs, in keeping with 26 U.S.C. 408, 42 Pa. C.S.A. Section 8124 (b) (1); Mo. Ann. Stat. Section 513.430 (10) (f); and M.G.L. Ch. 235, Section 34A, as well as under their own contracts.[14] Instead, after Ottenberg filed his 1995 complaint naming the funds as party defendants, the funds chose to voluntarily freeze the IRAs,[15] -

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[14] Vanguard's IRA Agreement, Article VIII, Section 8.2 provides that there is a "Prohibition Against Assignment ... no interest, right or claim in or any part of the Account ... shall be assignable, transferable, or subject to ... garnishment, attachment, execution or levy of any kind, and the Custodian shall not recognize any attempt to effect any of the preceding." Similarly, Paragraph 9, Page 20 of Founders' IRA Agreement provides that "No interest, right or claim in or to any part of the Custodial Account, nor any asset held therein or benefits provided hereunder shall be subject to alienation, assignment, garnishment, attachment, execution or levy of any kind . . . "

[15] The funds chose to freeze the IRAs voluntarily. The court below never issued an order directing that the funds give the IRAs to the Receiver.

thereby further breaching their contracts with Monga.**16**

Moreover, as the funds' contracts provide, and as IRS Publication 590 makes clear, Maharaj had the right after Monga's death to treat the IRAs as her own:

> Surviving spouse. If you are a surviving spouse who is the sole beneficiary of your deceased spouse's IRA, you may elect to be treated as the owner and not as the beneficiary.

http://www.irs.gov/publications/p590/ch01.html#d0e5724. Two weeks after Monga's death in 1996, Maharaj exercised that right by demanding that the funds turn over the IRA assets to her. They refused.

Vanguard told the receiver since 1992 that he should seek an order from a Pennsylvania court if he wished to reach the IRAs. The receiver was told that the procedure for enforcing a Massachusetts order was to "domesticate" that order in Pennsylvania. He refused to do so, and the funds ultimately colluded

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[16] As Judge Giles' Order dated April 18, 1996, in Action 95-6637 (E.D. Pa.) notes:

> ... the Funds [Vanguard and Founders] apparently realized that their liability to Mr. Monga may not be extinguished by compliance with the order of the Massachusetts court ....
>
> p. 2

The Order continues:

> ... A Massachusetts order releasing the funds to Mr. Ottenberg would not insulate the Funds [Vanguard and Founders] from an action by Mr. Monga ....
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> p. 4

with the other appellees. As footnote 16 of this Court's Opinion notes,

> the judge [below], sitting in a State court, lacked authority to issue injunctions restraining further actions against the fund defendants in Federal courts. On this point, the law is well-established in Maharaj's favor, and none of the appellees appear to contend otherwise. See, e.g., Donovan v. Dallas, 377 U.S. 408, 412-414, 84 S.Ct. 1579, 12 L.Ed.2d 409 (1964); General Atomic Co. v. Felter, 434 U.S. 12, 16, 98 S.Ct. 76, 54 L.Ed.2d 199 (1977). The language in the judge's order enjoining Maharaj from filing suit in Federal court is to be struck.

The appellees wisely chose not to "contend otherwise" before this Court, but that is little comfort for Monga or Maharaj. It certainly was not the posture the funds adopted in the Pennsylvania cases: Had those been allowed to follow their course, all issues concerning the IRAs would long ago have been resolved. The funds and the other appellees share responsibility for preventing such resolution.**17**

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[17] This Court's Opinion states:

> ... Ultimately, as of June 1, 1995, the fund defendants complied with a Superior Court order to freeze the IRA accounts, pending resolution of the competing claims ...

No such Order exists. The June 1992 ex-parte Massachusetts order appointing the Receiver makes no mention of the IRAs. The two ex-parte Massachusetts orders regarding the IRAs obtained by the Receiver on July 7, 1992, and August 20, 1992 were declaratory in nature, and were not directed to anyone in particular. No order exists which required the Funds to "freeze" the IRAs: As Judge Lenk's 1995 Order specifically states that the Funds were "voluntarily" freezing the IRAs.

Under the circumstances, to sanction the award legal fees against Maharaj, payable from her statutorily protected retirement savings, would be inequitable.

B. The ERISA accounts.

While this Court's opinion, footnote 13 addresses seizure of the minor's educational trust fund, it omits reference to Monga and Maharaj's ERISA accounts, valued at $26,840.57 when seized in 1992, App. 1246, 1249-50. See Appellants' Brief, pp. 11-12. The ERISA accounts were protected by the same laws which protect the IRAs, and their seizure was illegal for the same reasons. See this Court's opinion, footnote 8.[18]

C. Ottenberg's actions as receiver.

1. Liquidating the companies.

This Court's footnote 18 also states that liquidation of Core and Subsurface in 1992 was justified because of "...the companies' weak financial picture and uncertain prospects ...." The record does

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As *Patterson* long ago made clear, the IRAs were beyond the reach of the receivership because not the slightest evidence of fraud had been produced in connection with the IRAs by the time Vanguard chose the Massachusetts forum. Vanguard's legal and contractual obligation was clear: It should have obeyed the Pennsylvania order directing it to deposit the IRAs with the Pennsylvania court's prothonotary. See, Ottenberg's July 10, 1998 Affidavit, ¶ 5, Dkt.# 401; App. 999f.J.

[18] The lower Court permitted Ottenberg to seize these ERISA accounts in 1992 pending a hearing on the merits of Monga's claim that these were valid retirements savings protected from creditors' claims, a hearing which was never conducted.

not support this view. During oral argument last October 2005, Attorney Peter S. Brooks, ("Brooks"), was asked by Justice Graham, "Sixteen years ago, what was the state of the businesses?" Brooks answered: "The state of the businesses was they were healthy, they were prospering, they were growing rapidly." Three years later, on 7/14/92, Ottenberg filed a report showing the companies were solvent, the value of Core's and Subsurface's assets is greater than their outstanding debts, and adding:

> ... EnviroTech was actively and substantially engaged in the environment consulting and testing business, with substantial clients and apparently a substantial volume of business....
> ¶ 12. Dkt.# 192.5.

Despite Monga's supposed "extended absence from the jurisdiction," the companies were under his direction and thriving. Nothing imaginable could have occurred between Ottenberg's 7/14/92 report, and his request within 3 weeks of his appointment, to liquidate the companies. Ironically, Ottenberg's "justified" his request on the ground that the receivership itself was adversely affecting the companies' prospects! See Appellants' Brief, footnote 39. The companies' liquidation violates Richardson v. Clinton Wall Trunk, 181 Mass. 580, 583 (1902).

2. Annual reports.

This Court's footnote 18 states, "It appears from the record that this issue was not preserved for appeal." Argument 8.a. of Appellant's Brief, p. 45,

succinctly addresses the issue. The record shows that Monga and Maharaj for years complained about the Receiver's failure to observe his statutory obligations, and repeatedly sought judicial sanctions. There was no waiver of this issue on appeal, just a lack of space to expound the self-evident.

D. Sommer's death and the need to name a representative.

On March 6, 2006, Attorney Peter S. Brooks ("Brooks"), belatedly disclosed that appellee Sommer had died during the pendency of this appeal.[19] Mass.R.A.P. Rule 30 (a) provides that if the deceased party has no representative, "... proceedings shall then be had as the appellate court or a single justice may direct."

Absent an alternate representative for Mr. Sommer, Appellants request that Mr. Brooks be named as his representative, that he be charged with advising Appellants about the status of probating Mr. Sommer's will and ensuring that Mr. Sommer's estate not be dissipated.

Respectfully submitted,

John G. S. Flym, Prof. Emeritus
Northeastern Univ. school of Law
400 Huntington Ave.

[19] Efforts by Flym to obtain relevant information from Brooks by e-mail and by telephone have been unproductive, other than to reveal that Sommer died some time in December 2005.

Boston, MA 02115
617.373.3348
j.flym@neu.edu

Pro bono Attorney for Appellants

March 20, 2006

APPENDIX G

AppealsCourt of Massachusetts

No. 2004-P-0591

February 28, 2005

APPELLANTS' REPLY

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

No: 2004-P-0591
THE ESTATE OF D. DEV MONGA
SHANTEE MAHARAJ
Appellants

v.

PAUL F. SOMMER, SOMMER ENVIRONMENTAL TECHNOLOGIES, INC.
JOHN C. OTTENBERG, Receiver
VANGUARD FIDUCIARY TRUST COMPANY
VANGUARD/MORGAN GROWTH FUND, INC.
FOUNDERS FUNDS, INC., INVESTORS FIDUCIARY
TRUST COMPANY
Appellees

APPELLANTS' REPLY

Pursuant to MRAP Rule 16(c), the above-named Appellants submit this Reply to the Briefs of Appellees Sommer, Sommer Environmental, Ottenberg, Vanguard, Founders, and IFTC.

1. Appellees failed to request, during Monga's lifetime, an Order that Monga had waived his right

to a determination of the exempt status of his IRAs and other protected retirement savings.

Although Appellees filed dozens of pleadings during the fours years which elapsed between the default contempt order issued in 1992 and up through Monga's death in 1996, not once in those four years did any Appellee file a motion in the lower court seeking an Order that Monga had waived his right to a determination of the exempt status and ownership of the IRAs and his other retirement savings.

On 7/13/98, two years after Monga's death, Ottenberg filed a "Motion for Summary Judgment And/Or Sanctions", alleging that Monga had waived his rights to a determination of the exempt status and ownership of the IRAs, as well as of the minor nonparty's UTMA funds. Dkt. ## 400-402. On October 8, 1998, more than 2 years after Monga's death, the lower court granted summary judgment against Monga, accepting without citation of authority Ottenberg's belated theory that Monga had "waived" his right to an adjudication of the IRAs' exempt status.

2. The lower court's Orders prior to 1998 explicitly stated that the merits of the IRAs' status would be decided.

For example, the Order dated 8/20/92, Dkt. # 204, addressed to The Citadel Service Co., Inc., transfer agent for Founders Funds, states in part:

... 2) The receiver is ordered to maintain said funds in an account, designated as an IRA account, and thereafter entitlement to these funds shall be

determined in later proceedings in this case. (Doerfer, J.)

(emphasis added)

To the same effect, see Order dated, 8/20/92, Dkt. # 206, addressed to The Vanguard Morgan Growth Fund, which provides in part:

... 2) The receiver is ordered to maintain said in an account designated as an IRA account; and thereafter entitlement to these funds shall be determined in later proceedings. (Doerfer, J.) .

(emphasis added)

See also another Order dated 8/20/92, Dkt. # 208, as well as Dkt. # 194, (7/28/92); Dkt. # 211, (10/07/92); & Dkt. # 217 (10/19/92).

3. Before 1998, Ottenberg repeatedly asked the lower court to determine the merits of the IRAs' status.

For example, on 1/5/95, Ottenberg filed a "Complaint to Effect Turnover of IRA Accounts," naming Vanguard, IFTC and Founders as defendants, seeking a determination of the IRAs' validity, Dkt. # 285.

4. Before 1998, Ottenberg conceded that he could reach the IRAs only if they were fraudulently established or funded.

On 8/17/95, Ottenberg filed his Answer to Vanguard, IFTC and Founders' Counterclaims, ¶ 1 of which asks the court to "... determine the [IRAs'] rightful possession and ownership ...." Ottenberg's accompanying memorandum concedes that he can

only reach the IRAs if they were fraudulently established or funded, and admits that valid IRAs are "... exempt from the claims of creditors of Mr. Monga ...." "Receiver's Memorandum in Opposition to the IRA Trustees' Motions to Dismiss," at pp. 8, 10-11.

Almost a year after Monga's death on 8/23/96, Ottenberg filed an amended Substitute Complaint to Effect Turnover of Accounts on 8/13/97, adding Monga's widow, Maharaj, and the administrator of Monga's estate, Atty. Edmunds Brokans as parties. Dkt. # 373; App. 513-30, once again requesting:

"... a hearing on the merits as to the validity of the IRAs ...." "That after a hearing on the merits, this Court determine that the IRA accounts referred to above are not valid IRA accounts, exempt from the claim of creditors, but rather that said funds are in fact available for distribution in the receivership proceeding...."

Substitute Complaint to Effect Turnover of IRA Accounts, (3rd prayer for relief) App. 520.

5. Before 1998, the Funds opposed turning over Monga's IRAs absent proof that the IRAs had been fraudulently established.

On 9/26/94 and 10/18/94, Ottenberg filed complaints seeking to have Vanguard, Founders and IFTC found in contempt for refusing to turn over the IRAs. Vanguard, Founders and IFTC opposed turning over the IRAs to Ottenberg on the ground that they were exempt from reach by creditors. Vanguard and IFTC's 3/1/95 Motion to Dismiss Receiver's Substitute Complaint and Reply to

Receiver's Memorandum in Opposition to Motion to Dismiss also requests the court to:

... require Ottenberg to prove that the IRAs are invalid ... as that determination will be dispositive of all other issues in this case. If Ottenberg cannot prove that the IRAs were fraudulently established or funded, then Ottenberg has no right to proceed against the assets in any forum and this matter must be dismissed ....

App. 366-369.

Similarly, Founders argued:

... In the Receiver's Memorandum, the Receiver for the first time concedes that he is not entitled to reach the funds invested in Founders Funds in IRA accounts in the name of D. Dev Monga if the accounts are valid IRAs. The Receiver admits that valid IRA accounts are "exempt" from claims of creditors of Mr. Monga ...

In light of this, Founders Funds submits that the appropriate next step is for the Receiver to go forward on his newly pled Count XI against Mr. Monga to attempt to prove that these accounts are not in fact valid IRA accounts. Founders Funds should not be required to expend any further legal expenses in responding to the Receiver until the Receiver has proven that he has a right to reach these funds.

In addition, since the Receiver concedes that he is not entitled to reach these funds unless he has proven that they are not valid IRAs, there is no basis

for transferring these funds to the Receiver's control at this time ... The transfer of the funds may also impair the value of these funds since the Receiver would not be investing the funds in the same investment vehicle in which they are currently invested. There is no reason to put these funds at risk unless and until the Receiver establishes that they are not valid IRAs ...

Furthermore, the Receiver has not provided a factual basis for his claim that these are not valid IRA accounts. The only basis provided by the Receiver for its claim that these accounts are not valid IRA accounts is the allegation that the amount of funds in said IRA accounts "is extremely high for someone of Mr. Monga's age." Substitute Complaint, Count XI. Founders Funds should not be required to turn over funds or further defend this action based upon such a vague and unsupported allegation ....

Dkt. # 299. App. 370-372. Likewise, Vanguard and IFTC's 12/16/97 Answer to Receiver's Amended Substitute Complaint to Effect Turnover of Accounts, p. 13, ¶ 5, asks "That the Court determine the rights of the claimants to the IRA Accounts." Dkt. # 381.

6. Summary judgment may not be granted where material issues are in dispute, and the IRAs must be assumed to be valid.

It is axiomatic that summary judgment may not be granted if material issues are in dispute. See e.g., Liberty Mut. Ins. v. Zoltek, 419 Mass. 704, 706 (1995). All factual controversies must be resolved in favor of the non-moving party. Pederson v. Time, 404

Mass. 14, 17 (1989). Thus, for purposes of Ottenberg's 1998 motion for summary judgment, it must be assumed that the IRAs are valid.

Among the issues of fact in dispute are Ottenberg's vague but repeated allegations, between 1992 and 1998, that the IRAs were funded by Monga's alleged diversion of moneys otherwise reachable to satisfy the judgment. Ottenberg's 2/17/95 "Substitute Complaint to Effect Turnover of Accounts," adding Monga as a defendant, (again) seeks a determination of the IRAs' validity, alleging only that the amounts in the IRAs were "high for someone of Mr. Monga's age." Receiver's Substitute Complaint, Count XI, Dkt. # 295. Monga was then 52. Long before 1998, Ottenberg knew - because the record evidence left no doubt on this question - that the IRAs are untainted. The Appellee Funds certainly knew as much, and therefore until 1998 contested the lower court's right to order the IRAs turned over to Ottenberg.

In fact, there has never been any doubt that the IRAs are valid. The uncontested documentary evidence before the court, well before 1998, but also when it granted summary judgment, showed beyond any doubt that the IRAs are valid. See footnote 16 of Appellants' Brief herein. See also, App. 999A-999SS.

Faced with the fact that this truth would unavoidably emerge in the course of a hearing as to the IRAs' exempt status, Ottenberg shifted tactics after Monga's death, and for the first time in 1998,

sought to avoid an inquiry into the truth of the matter by inventing his waiver theory.

7. Summary judgment may not be granted where material issues are in dispute, and the allegations of misconduct by Appellants are in dispute.

Ottenberg dismissed all of his various motions for contempt against Monga, (see pp. 35-41 of Appellants' Brief herein), so that the only ostensible basis for the 1998 penalty waiver is the default contempt order obtained by Sommer on 6/15/92, allegedly for violations of a discovery order and fraudulent conveyance of assets otherwise reachable to satisfy the judgment. Following his appointment as receiver, Ottenberg simply adopted Sommer's allegations regarding fraudulent conveyances. Sommer's 1992 default contempt order is an insufficient basis for refusing to recognize that the IRAs are statutorily protected from a judgment creditor's claims.

Monga made repeated efforts to purge the default contempt order, see e.g. Monga's 9/24/92 "Motion for Leave to File a Motion to Remove Default Judgment and Finding of Contempt", Dkt. # 209, App.265-266; Motion for Leave to File a Motion to Remove Default Judgment and Finding of Court" filed 10/30/92, Dkt. # 222. See, also App. 286-287; "Motion for Reconsideration of Order Denying Motion to Remove Default Judgment and Finding of Contempt", with Monga's Affidavit dated July 7, 1993; Affidavit of Compliance Under Rule 9A, filed 8/3/93, Dkt. # 237, App. 288-89, 293-94; "Motion For Leave to File

Renewed Motion for Reconsideration of Order Denying Motion to Remove Default Judgment and Finding of Contempt," filed 11/04/93. Dkt. # 240, App. 295-296; Monga's Motion for Leave to File Renewed Motion for Reconsideration of Order Denying Motion to Remove Default and Finding of Contempt, filed in court and allowed 12/31/93. Dkt. # 244.1. Monga's Motion for Instructions for Purging of Contempt, Request for Oral Argument and Rule 9A Affidavit. 5/2/94, Dkt. # 250.

Monga also sought to appeal the lower court's denial of his efforts to purge the default contempt order. See e.g. Monga's Notice of Appeal from the courts' 12/31/93 order, filed 2/1/94. Dkt. # 246; Monga's Motion to Direct Clerk to Assemble Record filed 9/20/94, Dkt. # 273. Despite his repeated requests, the record was not assembled before Monga's death.

Particularly relevant is the "Affidavit of D. Dev Monga", dated 9/1/92, App. 226 - 264, which in the course of 38 pages, addresses and puts in issue, each and every one of Sommer's allegations, under the following headings:

Allegations Re: Conveyance of Real Estate

Allegations Re: Transfer of Operating Accounts and Escrowed Funds

Allegations Re: Intermingling, Depletion and Concealment of Assets

Allegations Re: Refusal to Provide Evidence With Respect to the Companies' Assets

Allegations Re: Efforts to Prevent or Impede Discovery Concerning Assets from Third Parties
Allegations Re: Recent Developments

In short, all of the factual allegations suggested as predicates for the 1998 penalty waiver summary judgment were, and are, in dispute.

8. Issue preclusion in Massachusetts.

Since the Appellees insist that no issue of fact existed to preclude summary judgment, another way of trying to understand the lower court's action is to examine the question of Monga's alleged misconduct in terms of issue preclusion.

In Massachusetts issue preclusion turns on the existence of four conditions:

... (1) there was a final judgment on the merits ...; (2) the party against whom estoppel is asserted was a party ... ; and (3) the issue in the prior adjudication is identical to the issue in the current adjudication ... [and (4)] the issue decided ... must have been essential to the earlier judgment.

Commissioner of Dept. of Employment & Training v. Dugan, 428 Mass. 138, 142 (1998).

In the instant case, (1) there was no judgment on the merits of the 1992 default contempt order; (2) there was no judgment on the merits as to the validity of Monga's exempt retirement savings, or nonparty assets, including the minor's UTMA funds; (3) the issues decided by the lower court on appeal herein are not identical to the 1992 default contempt judgment; (4) the issue of whether the IRAs and Monga's other retirement savings are exempt from

the reach of judgment creditors was not essential to the 1992 default contempt judgment.

As Treglia v. MacDonald, 430 Mass. 237, 241 (1999), holds:

> ... [j]udgment by default in the technical sense that the issues have not been litigated does not warrant issue preclusion for the very reason that the issues have not been litigated or decided...

See also Commissioner of Dept. of Employment & Training v. Dugan, 428 Mass. 138, 142 (1998). The above quote from Treglia v. MacDonald applies to the 1992 default contempt judgment, and a fortiori it applies to the order and judgment which rely on said default contempt judgment, and all of the other allegations of misconduct which were neither litigated nor decided.

Moreover, the procedure followed by the court below violates Due Process. As Kremer v. Chemical Const. Corp., 456 U.S. 461 (1982), holds:

> We have previously recognized that the judicially created doctrine of collateral estoppel does not apply when the party against whom the earlier decision is asserted did not have a "full and fair opportunity" to litigate the claim or issue ... "Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation." ...

FN22. While our previous expressions of the requirement of a full and fair opportunity to litigate have been in the context of collateral estoppel or issue preclusion, it is clear from what follows that

invocation of res judicata or claim preclusion is subject to the same limitation.

...

FN24. The Court's decisions enforcing the Full Faith and Credit Clause of the Constitution, Art. IV, § 1, also suggest that what a full and fair opportunity to litigate entails is the procedural requirements of due process.

at 480-81 (emphasis added)

Appellants challenge the "... quality, extensiveness, or fairness of procedures followed in ..." the court below. Appellants have been denied a full and fair opportunity to establish the validity of the IRAs, the other protected retirement savings, and the minor nonparty's UTMA funds.

9. The 1998 penalty waiver judgment violates the principle of abatement of prosecutions against deceased persons.

In any event, apart from the inappropriateness of granting summary judgment, (for the reasons stated in items 6-8 above), the penalty waiver issued by the lower court violates the principle of abatement of prosecutions after Monga's death. See Argument 1 of Appellants' Brief, pp. 19-27.

10. The Fund Appellees may not rely on an illegal order to deny Monga and Maharaj their statutorily protected rights in the IRAs.

Monga's IRAs were established long before Sommer even knew Monga, are fully protected by Congressional and State statutes, and are not subject to the claims of a judgment creditor. See Argument, part 2, pp. 22-32 of Appellants' Brief herein.

Since the IRAs were to be excluded from creditors' claims, and since the receivership order

was framed in general terms which omitted any mention of IRAs, Monga cannot be faulted for not turning over the IRAs to the receiver. Three subsequent orders explicitly addressed the IRAs, but they were directed at Vanguard and other parties, not Monga.**20** In its finding of waiver two years after Monga's death, the lower court overreached - just as its antisuit injunction can have "... no preclusive effect on the merits of ... litigation ..." in Pennsylvania, Baker by Thomas v. General Motors Corp., 522 U.S. 222, 236 (1998).

Whatever the scope of the lower court's jurisdiction, its order concerning the IRAs could be enforced only in Pennsylvania. Thus, in 1996, two years prior to the lower court's 1998 ruling, Judge Giles held in Monga's Pennsylvania Federal action against the Appellee Funds:

"... Additionally, the Funds [Vanguard and Founders] apparently realized that their liability to Mr. Monga may not be extinguished by compliance with the order of the Massachusetts court . . .

Moreover, should the Massachusetts court order become final, and remain adverse to the Funds, the Funds could file an action in federal court in Pennsylvania seeking a declaratory judgment as to the ownership of the monies. A Massachusetts order releasing the funds to Mr. Ottenberg would not insulate the Funds [Vanguard and Founders] from

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[20] If given the opportunity to do so, Appellants will show that, contrary to the lower court's summary judgment, Monga did not violate any of its orders.

an action by Mr. Monga ...." See, E.D.Pa. No. 95-6637.

Indeed, Vanguard's in-house counsel recognized the fact that an order by the lower court releasing the IRAs to Mr. Ottenberg would not insulate the Funds, as evidenced by the 12/1/94 Affidavit of Associate Counsel Suzanne F. Barton, and four letters, dated 10/1/92, 10/5/92, 10/13/92 and 6/30/94, written by Barton and Assistant General Counsel Paul F. Gallagher. See App. 999A-999H. In her Affidavit, Ms. Barton explains:

> "... On June 19, 1992, I received a copy of [a Massachusetts] order appointing John C. Ottenberg as Receiver of D. Dev Monga . . . The Receiver requested that Vanguard freeze Monga's [IRA] account and 'forward the funds' to the Receiver. On June 24, 1992, Vanguard froze the [IRA] account.
>
> . . .
>
> . . . [A]s counsel to Vanguard, I have been involved in several disputes in which parties have attempted to attach or otherwise assert control over a shareholder's shares in various mutual funds managed by Vanguard Group, Inc., including Vanguard Fund. In each case, the party asserting control of the shares has "domesticated" its claim by obtaining an appropriate judgment in an out of state court, and then requesting that the court of Pennsylvania execute on that out of state judgment pursuant to 42 Pa. C.S.A. Sec. 4306 et. seq. No party has ever asserted that Vanguard must turn over control over mutual funds shares based on an out of state court order.

Since October 1992, other counsel for Vanguard and I have repeatedly encouraged the Receiver to domesticate his Massachusetts' judgment by bringing it to the Pennsylvania courts for enforcement. However, we have never seen a copy of a final judgment against Monga issued by either the courts of Massachusetts or the courts of Pennsylvania."

See App. 999E-999H.

On October 5, 1992, Vanguard wrote to Ottenberg, "... we determined that it will be necessary for you to obtain an order from a Pennsylvania court of appropriate jurisdiction before we comply with your request to transfer the Monga IRA . . ."

Ms. Barton enclosed a copy of the Vanguard's IRA Agreement stating that, "Article 8.4 of the Agreement provides that the Monga IRA shall be governed by Pennsylvania law." Barton further stated, "As you know, Pennsylvania law prohibits attachment of IRA assets." See App. 999C.

On June 30, 1994, Paul F. Gallagher, Vanguard's Counsel reaffirmed this position to Ottenberg:

> "In reviewing our file I have not come across anything that would cause us to change the position that was set forth in Ms. Barton's correspondence to you of October 5, 1992. Namely, that jurisdiction as to the question of whether Mr. Monga's IRA assets are attachable lies with Pennsylvania courts. Accordingly, we must decline your request to transfer assets to you."

Gallagher stated, "... we can only take such action if we are ordered to do so by a Pennsylvania court ...." See App. 999D.

11. This case in a nutshell.

Granting the inherently charged context of a receivership proceeding intended to satisfy a judgment, and the risk that a judgment debtor may seek to avoid satisfaction of the judgment, the mirror risk is to sanction thuggery in the name of legal process. This case illustrates the latter risk.

The validity of the IRAs is clear, and it places the entire case in context. To understand how this case evolved as it did, this Court need only look at how the receivership began. Within weeks of his appointment, and while Monga's appeal of the underlying judgment was pending, (an appeal this Court recognized as possibly meritorious), Ottenberg liquidated the only assets Monga possessed which could have satisfied the judgment debt, and thereby - as Ottenberg himself observed - destroyed the assets' value. Ottenberg then cast about to seize whatever he could find which might have the remotest connection to Monga.

Ottenberg launched an endless series of ex parte proceedings, App 24-60, with the lower court routinely endorsing whatever Ottenberg requested. Like a castle built on sand, Ottenberg's case turns entirely on speculation and assertions contradicted either by Monga's (and others') Affidavits, or by the record.

One of Sommer's and Ottenberg's refrains has been the claim that Monga diverted assets to defeat satisfaction of the judgment. However, the record reveals that Ottenberg seized and liquidated Monga's

businesses, his home, and his bank accounts. What else, (apart from statutorily protected retirement savings such as the IRAs), would one expect to find? Ottenberg also seized all of the documents contained in Monga's home and businesses, (including illegal seizures of mail belonging to third parties). In addition, Ottenberg had well over 5000 documents produced by Monga in the course of Sommer's discovery, as well as several of Monga's depositions. Despite all of this available evidence, Ottenberg has failed to prove a single instance of fraudulent conveyance by Monga.

Another of Appellees refrains concerns Monga relocating to Pennsylvania. It is hard to understand what non-Kafkaesque scenario Appellees have in mind here. Monga up to then had enjoyed a highly successful career as a petroleum engineer. Monga's Affidavit dated 9/1/92, App. 226-264, explains that, having lost his home as well as his multi-million dollar business, (before his appeal could be heard which might have reversed the underlying judgment), and being under relentless attack by Sommer and Ottenberg, Monga had little choice but to try to rebuild his personal and professional life elsewhere.

Monga, a petroleum engineer and environmental consultant, moved to PA in 1995 because the location was ideal to pursue new environmental related business with manufacturers of environmental equipment, a business which would not involve capital expenditures. Monga envisioned that he would provide the essential expertise as a consultant, and the equipment manufacturers would provide the necessary equipment. There were also other environmental consulting opportunities in the

PA/NJ/DE area with chemical companies such as Dupont.

One of Sommer's and Ottenberg's predilections has been to cast innocent transactions in a suspicious light. This Court does not need much imagination to take judicial notice that someone of Monga's heritage might well have a large family, with relatives spread over the face of the earth. Monga in fact had a large family, as does his wife Maharaj, with relatives living in Europe, Asia, and North America. In the pre-internet, pre ATM world of this case, having dollar accounts in the United States and international fund transfers were common practices in Asian communities, and it is common to this day for family members residing in the United States to accept bank statements and manage accounts for relatives living abroad.

If given a chance, Appellants will show on remand to the lower court that not a single penny was diverted by Monga in order to avoid satisfaction of the judgment debt. See also Appellants' Brief p. 38, n. 30. The proof of the pudding, so to speak, is that Monga's widow, Maharaj, is virtually penniless - which is why she is being represented pro bono. The notion that Monga diverted large sums of money without providing for his wife is absurd. But then, on remand, Sommer and Ottenberg should welcome an opportunity to try to show that Maharaj, (who has been reduced to living rent free in a friend's house), is somehow engaged in an elaborate charade.

CONCLUSION

The public interest in IRAs is self-evident - tens of millions of Americans are invested in IRAs, and government policy encourages such participation.

This population, as well as retirement fund managers such as Vanguard and Founders, are entitled to rely on the protection afforded by Federal and State law for IRAs against reach either by creditors or by receivers.

For this, along with the procedural and substantive issues set forth above as well as in Appellants' Brief herein, Appellants pray this Honorable Court to set aside the 1998 Order and 2000 Judgment.

Appellants further pray this Court to grant such other and/or further relief as it may deem appropriate in the circumstances of this case.

Respectfully submitted,

John G. S. Flym, Prof.
Northeastern U. Law School
400 Huntington Ave.
Boston, MA 02115
617.373.3348
j.flym@neu.edu
BBO # 172180

Pro Bono Attorney for Appellants

APPENDIX H

United States Court of Appeals
for the Third Circuit

No. 01-1827

filed July 30, 2002

OPINION

NO: 01-1827

D. DEV MONGA

v.

JOHN C. OTTENBERG, ESQ., Individually and as Receiver,
BERRY, OTTENBERG & DUNKLESS; VANGUARD GROUP, INC.; VANGUARD FIDUCIARY TRUST COMPANY; VANGUARD/MORGAN GROWTH FUND, INC.; PAUL F. SOMMER; PETER S. BROOKS; BROOKS AND LUPAN; FOUNDERS FUNDS, INC.; INVESTORS FIDUCIARY TRUST COMPANY

The Estate of D. Dev Monga, by its Executrix, Shantee Maharaj ("Maharaj"),
Appellant
*(Pursuant to Rule 12(a), F.R.A.P.)

On Appeal From the United States District Court for the Eastern District of Pennsylvania
(D.C. Civ. No. 95-cv-5235)
District Judge: Honorable Herbert J. Hutton

Submitted Under Third Circuit LAR 34.1(a)
April 12, 2002

Before: ALITO, ROTH AND FUENTES, CIRCUIT JUDGES
(Filed July 30, 2002)

OPINION

PER CURIAM

The Estate of D. Dev Monga ("Monga"), by its Executrix, Shantee Maharaj ("Maharaj"), appeals the dismissal of a complaint filed by Monga against John C. Ottenberg; Berry, Ottenberg & Dunkless; Vanguard Group, Inc.; Vanguard Fiduciary Trust Company; Vanguard/Morgan Growth Fund, Inc.; Investors Fiduciary Trust Company; and Founders Funds, Inc. Because this is an appeal from the district court's dismissal of Monga's complaint, we exercise plenary review. See Moore v. Tartler, 986 F.2d 682, 685 (3d Cir. 1993).

The circumstances surrounding this appeal began with a 1991 Massachusetts Superior Court ("Massachusetts court") judgment in the amount of $478,904 against Monga and two corporations which he controlled. Following the entry of judgment, the Massachusetts court entered injunctive orders prohibiting Monga from transferring his assets away from the jurisdiction. Despite the injunction, Monga mingled and concealed assets, and fraudulently conveyed both real and personal property to one or more third parties in an attempt to frustrate satisfaction of the judgment.

In June 1992, the Massachusetts court appointed John Ottenberg ("Ottenberg"), an attorney practicing law in Massachusetts, as Receiver to marshal Monga's assets. Ottenberg was ordered to collect all of Monga's assets, including two Individual

Retirement Accounts ("IRAs"), of which Vanguard and Investors Fiduciary Trust Company ("the Funds") are the custodians. The Funds then froze Monga's IRAs. Thereafter, the Massachusetts court entered another order, directing that all of Monga's assets, including the IRAs, be transferred to the Receiver. Monga, however, resisted the Massachusetts court's orders, claiming that neither he nor the Funds were subject to the jurisdiction of the Massachusetts court, and that in any event, the IRAs were exempt from attachment or execution.

In August 1995, while litigation over the IRAs continued in Massachusetts, Monga filed this pro se action in the District Court for the Eastern District of Pennsylvania. In this action, Monga seeks a declaratory judgment that the IRAs are exempt from creditors under federal and Pennsylvania law, as well as damages for various federal and state tort claims against Ottenberg; Berry, Ottenberg & Dunkless ("Dunkless"), a Massachusetts law firm; and the Funds.

Prior to the resolution of either the litigation in Massachusetts or the first Pennsylvania action, Monga filed an action in the Court of Common Pleas of Montgomery County, Pennsylvania, in September 1995, in which he again requested a declaratory judgment that the IRAs were exempt from creditors. The September 1995 action was eventually removed to the District Court of Eastern Pennsylvania ("second Pennsylvania action"). Meanwhile, in October 1995, the Massachusetts court issued an injunction prohibiting Monga and his counsel from

pursuing Monga's claims in Pennsylvania any further.

In January 1996, the district court entered an order in the second Pennsylvania action dismissing Monga's complaint as to Ottenberg for lack of personal jurisdiction. Relying on the January 1996 order, the district court in this action dismissed all claims against Ottenberg, concluding that claim preclusion barred the exercise of personal jurisdiction over Ottenberg. In addition, the district court dismissed all claims against Dunkless, concluding that the
Massachusetts law firm lacked the requisite contacts with the Commonwealth of Pennsylvania to warrant the exercise of personal jurisdiction. All proceedings in this action were then stayed and the case was placed on the suspense docket after Monga was diagnosed with cancer. Monga died in August 1996. Since then, his widow and the executrix of his estate, Maharaj, has pursued the litigation in Massachusetts and Pennsylvania.

On August 1, 2000, the Massachusetts court entered a Judgment on the Receivership, distributing the receivership among Monga's creditors and discharging Ottenberg as Receiver. In the judgment, the Massachusetts court specifically addressed the IRAs at issue here, providing that the accounts were "to be turned over, forthwith, to the receiver, for distribution to creditors, subject only to the funds' claims for attorneys fees and litigation costs." The Massachusetts court determined that "Monga's continued defiance of this Court's orders, right until the time of his death, stripped him of all right to

assert claims of statutory exemption for these accounts." Because Maharaj's claim to the assets derived solely from Monga's, the court concluded that she had no present interest in the accounts. Thus the court had "no occasion to consider which of the various statutory exemptions...would apply, and what proportion of the assets would be exempt."

Thereafter, more than five years after this action was placed on the suspense docket, the Funds filed a motion to dismiss in the district court.1 The district court granted the motion in March 2001. Maharaj then filed this appeal from the June 1996 and March 2001 district court orders dismissing Monga's 1995 complaint. For the reasons that follow, we will affirm.

The District Court properly dismissed Monga's complaint as to Ottenberg based on the doctrine of issue preclusion. Issue preclusion bars re-litigation of an issue identical to that in a prior action. See Edmundson v. Borough of Kennett Square, 4 F.3d 186, 189 (3d Cir. 1993). "The prerequisites for the application of issue preclusion are satisfied when: (1) the issue sought to be precluded [is] the same as that involved in the prior action; (2) that issue [was] actually litigated; (3) it was determined by a final and valid judgment; and (4) the determination [was] essential to the prior judgment." Burlington N.R.R. Co. v. Hyundai Merchant Marine Co., 63 F.3d 1227, 1231-32 (3d Cir. 1995) (citations and quotations omitted). Issue preclusion applies with equal force to a prior determination by a court that it lacks personal jurisdiction over a party. See Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522, 525-

26 (1931) (adjudication of personal jurisdiction issue precludes subsequent re-litigation of same issue); see also Matosantos Commercial Corp. v. Applebee's Int'l. Inc., 245 F.3d 1203, 1209 (10th Cir. 2001).

Here, all four prerequisites for the application of issue preclusion are met. The issue of the exercise of personal jurisdiction over Ottenberg was specifically determined by the district court in the second Pennsylvania action, and the determination resulted in a final, valid judgment.2 Monga was a party to the prior litigation and had a full and fair opportunity to litigate the issue of personal jurisdiction. Accordingly, Monga was barred by the doctrine of issue preclusion from arguing in this action that the district court had personal jurisdiction over Ottenberg.

The District Court properly dismissed Monga's complaint as to Dunkless for lack of personal jurisdiction. Pursuant to Fed. R. Civ. P. 4(e), a district court may assert personal jurisdiction "over non-resident defendants to the extent permissible under the law of the state where the district court sits." Pennzoil v. Colelli & Assocs. Inc., 149 F.3d 197, 200 (3d Cir. 1998). "Pennsylvania's long-arm statute, 42 Pa. Cons. Stat. Ann. Sect. 522(b), authorizes Pennsylvania courts 'to exercise personal jurisdiction over nonresident defendants to the constitutional limits of the due process clause of the fourteenth amendment.'" Remick v. Manfredy, et al., 238 F.3d 248, 255 (3d. Cir. 2001) (quoting Mellon Bank (East) PSFS, Nat'l Ass'n v. Farino, 960 F.2d 1217, 1221 (3d Cir. 1992)). The plaintiff bears the burden of establishing that a defendant "purposefully avails itself of the privilege of conducting activities within

the forum State, thus invoking the benefits and protections of its laws." Asahi Metal Indus. Co., Ltd. V. Superior Court of California, 480 U.S. 102, 109 (1987) (citations and quotations omitted).

Personal jurisdiction may be exercised under two distinct theories, general jurisdiction or specific jurisdiction. See Remick, 238 F.3d at 255. General jurisdiction requires a showing that a defendant had "continuous and systematic" contacts with the forum state, and exists even if a plaintiff's cause of action arises from the defendant's non-forum related activities. See Vetrotex CertainTeed Corp. v. Consol. Fiber Glass Prod. Co., 75 F.3d 147, 151 n.3 (3d Cir. 1996) (citations omitted). Specific jurisdiction, on the other hand, exists only if a plaintiff's cause of action rises out of a defendant's forum-related activities, such that a defendant "'should reasonably anticipate being haled into court there.'" Id. (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). Monga's assertion of personal jurisdiction is based solely on the theory of specific jurisdiction. In his submission to the district court, Monga failed to make any distinction between Ottenberg and Dunkless for purposes of personal jurisdiction, and only offered evidence related to Ottenberg's actions in this matter.

As is clear from the protracted proceedings at issue here, the entire matter arose from the entry of a judgment against Monga in Massachusetts, and Monga's repeated attempts to frustrate satisfaction of the judgment. Although Monga asserted that Ottenberg attempted to seize funds (the IRAs) located in Pennsylvania, Monga failed to present any

evidence that in his effort to do so, Ottenberg directed any activity at Pennsylvania. Ottenberg neither registered the Massachusetts judgment in Pennsylvania, nor did he obtain a writ of execution from a court in this jurisdiction. Instead, all matters related to Ottenberg's position as Receiver originated, and were conducted, in Massachusetts. Thus, the district court correctly concluded that Monga failed to establish that Dunkless had the necessary "minimum contacts" with Pennsylvania, such t hat the exercise of personal jurisdiction over the law firm would comport with "traditional notions of fair play and substantial justice." International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

Finally, the declaratory judgment claim and the breach of contract, breach of the duty of good faith and fair dealing, and conversion claims brought against the Funds fail as a matter of law. On August 1, 2000, the Massachusetts court entered a Judgment on the Receivership, distributing the receivership estate among Monga's creditors and discharging Ottenberg as Receiver. In the judgment, the Massachusetts court concluded that neither Monga nor Maharaj had any interest in the IRAs, and that Ottenberg, as the Receiver, was entitled to the IRAs for the purpose of distributing the assets to creditors. It is well settled that federal courts must give full faith and credit to the effect of a previously adjudicated state court judgment. See Migra v. Warren City Sch. Dist. Bd. Of Educ., 465 U.S. 75 (1984). Thus, all courts must treat a state court judgment with "the same respect that it would receive in the courts of the rendering state...and must accept the rules chosen by the State from which the judgment is taken" in determining the effect of

the judgment. Matsushita Elec. Indust. Co v. Epstein, 516 U.S. 367, 373 (1966) (citations and quotations omitted); see also Gregory v. Chehi, 843 F.2d 111, 116 (3d Cir. 1988). Accordingly, to determine the preclusive effect of a prior state ruling, a federal court must apply the preclusion rules of the adjudicating state. See Greenleaf v. Hopeman Bros., Inc., 174 F.3d 352, 356-57 (3d Cir. 1999).

Under Massachusetts law, issue preclusion is warranted when the following conditions are met: "(1) there was a final judgment on the merits in the prior adjudication; (2) the party against whom estoppel is asserted was a party (or in privity with a party) to the prior adjudication; ...(3) the issue in the prior adjudication is identical to the issue in the current adjudication"... and (4) "the issue decided in the prior adjudication [was] essential to the earlier judgment." Commissioner of the Dept. of Employment & Training v. Dugan, 697 N.E.2d 533, 536 (Mass. 1996). Here all four conditions are met. The issue of ownership of the IRAs was specifically determined by the Massachusetts court, and the determination resulted in a final, valid judgment. Monga was a party to the prior litigation and had a full and fair opportunity to litigate the issue of whether and to what extent the IRAs were subject to the claims of Monga's creditors. Maharaj is, therefore, barred by the doctrine of issue preclusion from arguing in this action that she has any right to the IRAs or that the IRAs are not subject to the claims of Monga's creditors.

Because the Massachusetts court concluded that neither Monga nor Maharaj had right to the IRAs,

the Funds did not act improperly in freezing the assets. As such, the declaratory judgment claim and the breach of contract, breach of the duty of good faith and fair dealing, and conversion claims brought by Monga against the Funds fail as a matter of law.

Accordingly, we will affirm for the reasons articulated herein and by the district court.

APPENDIX I

United States District Court for the
Eastern District of Pennsylvania,
CA No. 95-5235

March 1, 2001

MEMORANDUM AND ORDER

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
No. 95-5235

D. DEV MONGA
v.
JOHN C. OTTENBERG, et al.
FILED MAR 1-2001
ENTERED: 3/2/01

MEMORANDUM AND ORDER

February 28, 2001

HUTTON, J.

Presently before this Court are Motion of Vanguard and IFTC to Dismiss This Action with Prejudice (Docket No. 70), Motion of Founders Funds to Dismiss with Prejudice (Docket No. 72), Plaintiff's Corrected Memorandum in Opposition to Vanguard's, IFTC's and Founders Motions to Dismiss (Docket No. 87), Reply Brief of Vanguard and IFTC in Support of Their Motion to Dismiss this Action with Prejudice (Docket No. 88), Reply of Founders Funds, Inc. In Support of its Motion to Dismiss this Action with Prejudice (Docket No. 89) and Plaintiff's Opposition to New Material Inappropriately Submitted by Vanguard and IFTC in their Reply Brief, and Plaintiff's Response to Misstatements of Fact and Law (Docket No. 90). For the following reasons, Defendant's Motions are GRANTED and this action is dismissed with prejudice.

STANDARD OF REVIEW

When considering a motion to dismiss a complaint for failure to state a claim under Rule 12 (b) (6)1, this Court must "accept as true the facts alleged in the complaint and all reasonable inferences that can be drawn from them. Dismissal under Rule 12 (b) (6) ... is limited to those instances where it is certain that no relief could be granted under any set of facts that could be proved." Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990) (citing Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988)); see also H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 249-50 (1989). A court will only dismiss a complaint if "'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" H.J. Inc., 492 U.S. at 249-50. Nevertheless, a court need not credit a plaintiff's "bald assertions" or "legal conclusions" when deciding a motion to dismiss. See Morse v. Lower Marion Sch. Dist., 162 F.3d 902, 906 (3d Cir. 1997). The Federal Rules of Civil Procedure do not, however, require detailed pleading of the facts on which a claim is based. Instead, all that is required is a "short and plain statement of the claim showing that the pleader is entitled to relief," enough to "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." FED. R. CIV. P. 8 (a) (2) (West 2000).

DISCUSSION

This action was commenced by D. Dev Monga ("Monga") on November 25, 1995. It is the third action filed arising from the same dispute between

Monga and a receiver appointed by the Massachusetts Superior Court, John C. Ottenberg ("Ottenberg"), concerning the collection by Ottenberg of Monga's assets for distribution to judgment creditors and his now defunct corporation. See Massachusetts Superior Court Civil Action No. 89-2951. Among the assets in dispute are certain roll over Individual Retirement Accounts with Founders Funds, Inc., of which Vanguard and IFTC are the respective custodians. The action in the above captioned case, a second action also filed in the Eastern District of Pennsylvania (Civil Action No. 95-6637) and the Massachusetts Superior Court action all arose from the same factual background and raised essentially the same issues.

The Eastern District of Pennsylvania Action No. 95-6637 was dismissed on April 18, 1996 by the Honorable James T. Giles. In March of 1996, Monga was diagnosed with cancer. As a result of Monga's illness, all proceedings in the instant action were stayed and this case was placed in the Suspense Docket on June 13, 1996. Monga died on August 23, 1996. Since then, his widow and the executrix of his estate, Shantee Maharaj ("Maharaj") has pursued the Massachusetts litigation.

On August 1, 2000 the Massachusetts Superior Court entered its Judgment on the Receivership, distributing the receivership estate among Monga's creditors and discharging Ottenberg as Receiver. See Judgment on Receivership, entered August 1, 2000.

During a recent hearing before the Massachusetts Superior Court, Ms. Maharaj stated her

understanding that the "complaint [in the Pennsylvania action] was ...voluntarily dismissed in 1998..." and that "litigation in other jurisdictions [had been] barred [by the Massachusetts Superior Court]...." See Transcript of excerpt from hearing held on June 22, 2000, at pp. 1-19, 1-21

In addition, Ms. Maharaj has been "permanently enjoined" by the Massachusetts Superior Court "from instituting or prosecuting against Vanguard, IFTC, or any of them, any proceeding in any state of United States court or administrative tribunal regarding the Monga IRA accounts." See Memorandum of Decision and Orders on Pending Motions, October 8, 1998, at 19. Also, in that same Order of the Massachusetts Superior Court, Ms. Maharaj was "permanently enjoined from instituting or prosecuting against Founder Funds, Inc., any proceeding in any state or United States court or administrative tribunal regarding the Monga IRA accounts." See id, at 20.

Accepting all facts and all reasonable inferences in Plaintiff's Complaint as true, the Court holds that Plaintiff is not entitled to relief.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

D. DEV MONGA : CIVIL ACTION
:
JOHN C. OTTENBERG, :
et al. : NO. 95-5235

ORDER

AND NOW, this 28th day of February, 2001, upon consideration of Motion of Vanguard and IFTC to Dismiss This Action with Prejudice (Docket No. 70), Motion of Founders Funds to Dismiss with Prejudice (Docket No. 72), Plaintiff's Corrected Memorandum in Opposition to Vanguard's, IFTC's and Founders Motions to Dismiss (Docket No. 87), Reply Brief of Vanguard and IFTC in Support of Their Motion to Dismiss this Action with Prejudice (Docket No. 88), Reply of Founders Funds, Inc. in Support of its Motion to Dismiss this Action with Prejudice (Docket No. 89) and Plaintiff's Opposition to New Material Inappropriately Submitted by Vanguard and IFTC in their Reply Brief, and Plaintiff's Response to Misstatements of Fact and Law (Docket No. 90) IT IS HEREBY ORDERED that Motions are GRANTED and this action is dismissed with prejudice.

BY THE COURT

"s/Herbert J. Hutton"
Herbert J. Hutton, J.

1Rule 12 (b) (6) provides that "[e]very defense, in law or fact, to a claim for relief in any pleading...shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the opinion of the pleader be made by motion:...(6) failure to state a claim upon which relief can be granted...." Fed. R. Civ. P. 12 (b) (6).

APPENDIX J

Massachusetts Superior Court CA. No. 89-2951

Dated June 26, 2000
Entered August 1, 2000

JUDGMENT ON RECEIVERSHIP

COMMONWEALTH OF MASSACHUSETTS

Dated: June 26, 2000
Entered August 1, 2000

MIDDLESEX, SS. SUPERIOR COURT
DEPARTMENT OF THE TRIAL COURT
CIVIL ACTION NO. 89-2951

PAUL F. SOMMER, Plaintiff

v.

D. DEV MONGA, ET AL.
Defendants

JUDGEMENT ON RECEIVERSHIP

This matter having come before the Court on the Receiver's Final Account, Request for Instructions and Request for Discharge, and the Amended Receiver's Final Account, and after hearing, it is hereby ordered, adjudged and decreed as follows:

The Receiver's Final Account, as Amended, is allowed.

All of the funds held be the Receiver, i.e., $214,750.54, shall be treated as a single unitary fund for the benefit of creditors of the estates of Core Environmental Resources, Inc., EnviroTech Management, Inc., D. Dev Monga and Shantee Maharaj Monga.

The Receiver is ordered to pay

to Ottenberg & Dunkless LLP the sum of $43,265.55;

to Choate, Hall & Stewart, as attorneys for Vanguard Fiduciary Trust Co., Vanguard Morgan, Growth Fund and Investors Fiduciary Trust Company, the sum of $12,000;

to Brooks and Lupan, the sum of $60,000.00; and

to Paul F. Sommer, the sum of $ All remaining funds held by the receiver.

The Receiver shall make the distribution set forth in paragraph 3 within 30 days from the date of entry of this Judgment, absent entry of an Order staying these paragraphs of Judgment.

That upon filing a certificate of compliance with respect to paragraph 3, above, John C. Ottenberg shall be discharged as Receiver of Core Environmental Resources, Inc., EnviroTech Management, Inc., Subsurface Technologies, Inc, D. Dev Monga and Shantee Maharaj Monga.

"s/Judith Fabricant"
Judith Fabricant
Justice of the Superior Court

Dated: June 26, 2000
ENTERED: AUGUST 1, 2000

APPENDIX K

Massachusetts Superior Court
CA No. 89-2951

Dated October 8, 1998

MEMORANDUM OF DECISION AND ORDERS ON PENDING MOTIONS

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss. SUPERIOR COURT
CIVIL ACTION NO. 89-2951
October 8, 1998

PAUL F. SOMMER

vs.

D. DEV MONGA, et al.1

MEMORANDUM OF DECISION AND ORDERS ON PENDING MOTIONS

BACKGROUND

The background of this case through January 13, 1994, appears in Sommer v. Monga, 35 Mass. App. Ct. 761 (1994). As the Appeals Court recited there, the case arose from a dispute between Paul Sommer and D. Dev Monga, who were business associates with interests in two corporations controlled by Monga.2 That dispute was tried to a jury in July of 1991, resulting in a judgment for Sommer, against Monga and the two corporations, in the amount of $478,904. Since then, Sommer's efforts to collect on the judgment, and Monga's resistance to those efforts, have spawned an extraordinary series of proceedings in this and a number of other courts, continuing even after Monga's death from cancer in 1996. After rulings by multiple judges and multiple courts on various aspects of the dispute, it now appears that two substantive issues remain to be decided in order to bring this matter to closure.

Those are: (1) the disposition of assets held in certain Individual Retirement Accounts, and (2) the disposition of certain assets that had been held by Monga's wife, Shantee Maharaj, allegedly for the benefit of her minor nephew. Those two substantive issues, and certain related matters, are the subject of some twenty motions presently pending, on which the Court heard argument on September 10 and 24, 1998. This memorandum will address those issues, and each of those motions.3

Further background (but considerably less than an exhaustive history of the proceedings) is necessary to an understanding of the issues now presented. As the Appeals Court recited, while Monga's appeal from the judgment was pending, Sommer commenced postjudgment discovery in an effort to locate and attach assets available to pay the judgment, and he obtained an injunction prohibiting Monga and his two corporations from transferring assets other than in the regular course of business. 33 Mass. App. at 762. Further disputes arose, leading to the entry of additional injunctive relief against Monga, the initiation of contempt proceedings, and a request for appointment of a receiver.4 Id. In support of the contempt complaint and request for receivership, filed on June 10, 1992, Sommer presented affidavits and supporting exhibits indicating that during the litigation and since the entry of judgment, Monga had alienated and secreted numerous and substantial personal and corporate assets, in violation of preliminary and permanent court orders, and that Monga's wife, Shantee Maharaj, had actively assisted and participated with him in those activities by, among other means, allowing Monga's

and the corporation's assets to be co-mingled with her own, and then transferring them to others.

On June 10, 1992, this Court (Izzo, J.), issued and order, returnable on June 15, 1992, directing Monga and the corporations to show cause why they should not be held in contempt, and directing Monga, the corporations, and Maharaj to show cause why a receiver should not be appointed. Monga, Maharaj, and the corporations failed to appear on the return date. The court, (Izzo, J.) adjudged Monga in contempt by default, issued a capias for his arrest, and allowed Sommer's motion for appointment of a receiver. In a written order dated July 8, 1992, the Court, (Izzo, J.) expressly found that "Core, Subsurface and Monga have assets that are applicable to payment of Sommer's judgment, but Monga has mingled the assets of Core and Subsurface with his own and with those of Envirotech5 and his wife Maharaj, and concealed assets of all four." The Court further found that "Sommer's judgments against Monga cannot be satisfied because Monga has fraudulently conveyed his real and personal property to one or more third parties." On the basis of these and other findings, the Court appointed John Ottenberg as "receiver of the estate, property, money, debts, and effects of every kind and nature of or belonging to the defendant, EnviroTech, and to Maharaj," and directed Ottenberg "to collect, receive and take possession and charge of all such assets and singular thereof, and to hold the same subject to the further order of the Court." The Court further ordered "the defendants, EnviroTech and Maharaj, their officers, servants, agents and attorneys and each of them, ...to deliver said receiver

all of the property, moneys, stock in trade and effects of every kind and nature, belonging to the defendants in their hands, possession or control, together with all books, deeds, documents, vouchers, and papers related thereto," and further enjoined them from "collecting any of the debts or accounts due to the defendants, and from using, spending, injuring, conveying, transferring, selling or in any manner disposing of or encumbering any of the effects or property aforesaid, except to deliver them into the hands of said receiver." The Court directed the receiver to hold and to account for all such property, and to make no disbursements "without further order of the Court." Further, the Court ordered that "any of the parties, Envirotech or Maharaj, or the said receiver, may apply to the Court from time to time for such further directions, or orders as may be necessary."

The receiver, subsequent to his appointment, made extensive efforts to obtain possession of assets of the receivership, without, according to his affidavits and voluminous supporting materials, any assistance from either Monga or Maharaj; indeed the receiver's filings, supported in large part by materials of record in this Court's file, indicates that Monga and Maharaj continuously and actively thwarted his efforts. In her filings on the present motions Maharaj disputes many of the receiver's statements regarding Monga's conduct and her own, and regarding the procedural history of the case, but nowhere in her many submissions does she contend, or offer evidence, that either she or Monga ever turned any assets over to the receiver, as the Court ordered them to do.

Among the assets the receiver identified were certain mutual fund accounts in Monga's name denominated as Individual Retirement Accounts; an account at the Central Cooperative Bank in Maharaj's name as trustee, under a revocable trust, for the benefit of her nephew, Adhiraj Deepak Gosine; and an account with Fidelity Service Company in the name of Maharaj as custodian for Gosine under the Uniform Transfers to Minors Act.6 On requests of the receiver for instructions, the Court issued orders with respect to each of these accounts.

On July 6, 1992, the Court (Izzo, J.) ordered that "all funds of the defendants or Maharaj standing in a so-called "IRA" account including the account with Vanguard Fiduciary Trust Co. shall be transferred to the receiver and held and administered in accordance with the previous order of this court appointing the receiver." On August 20, 1992, the Court (Doerfer, J.) ordered that Citadel Service Co. Inc., transfer agent for Founders Funds, and Vanguard/Morgan Growth Fund, turn over to the receiver all IRA funds in Monga's name. On October 19, 1992, the Court (Neel, J.) entered similar orders with respect to Franklin Administrative Services, Inc., and Franklin Utilities. As will appear further, these orders were not fulfilled, due at least in part to Monga's threats, subsequently realized, to sue these entities.

On July 28, 1992, the Court (Izzo, J.) ordered the Central Cooperative Bank "to turn over to the receiver all of the funds" in the specified account in Maharaj's name as trustee for Gosine, and further ordered the receiver to maintain those funds in a

segregated account, and to attempt to locate and to notify Gosine. On August 20, 1992, the Court (Doerfer, J.) entered the same order with respect to the Fidelity account. The Central Cooperative Bank and Fidelity turned the funds over, and the receiver has held them as ordered since 1992. The receiver attempted to locate and notify Gosine without success and, until the hearing before this Court on September 24, 1998, without assistance from Maharaj. At that hearing, for the first time, Maharaj supplied Gosine's address, the names of his parents, Choundralaka and Jairha Gosine, and his birthdate.7

On February 3, 1993, the receiver filed a complaint for contempt against both Monga and Maharaj, alleging conduct by both of them in defiance of the receivership order and of subsequent orders of the Court, particularly with respect to certain funds held in a Florida bank account. The contempt complaint was served in the manner directed by the Court, and trial of the contempt complaint was scheduled for July 23, 1993, but the trial was postponed and apparently never held.

On January 13, 1994, the Appeals Court issued its decision on Monga's appeal from Sommer's judgment. Based on the 1992 finding of contempt against Monga, and his failure to purge himself of contempt since that finding, the Appeals Court ordered his appeal dismissed sixty days after issuance of the rescript unless Monga brought himself into compliance with the Court's orders within that time. Monga failed to do so. On June 3, 1994, this Court (O'Toole, J.), ordered issuance of execution on the original judgment, along with an

additional $100.000 as a penalty for the contempt, as adjudged by default in June, 1992. Executions issued on August 12, 1994, totaling some $870,000. Thereafter, the Court (O'Toole, J.), ordered the filing of proofs of claim by the creditors within a specified time. Various creditors filed such proofs, and the Court authorized certain disbursements.8

On September 26, 1994, the receiver filed a complaint for contempt against the Vanguard Fiduciary Trust Co., Vanguard/Morgan Growth Fund, Franklin Administrative Services, Inc., and Franklin Utilities Fund, alleging their failure to comply with the Court's earlier orders to turn over Monga's IRA funds. In response, these entities, hereinafter referred to as "the funds", challenged the Court's jurisdiction over them, asserted that they were not parties to the action, and relied Monga's threats to sue them. They did, however, freeze the IRA accounts pending further court orders. On December 26, 1994, this Court (Neel, J.), entered an order ruling that it did have jurisdiction over the funds, and again directed that the accounts be turned over to the receiver. Faced with Monga's continued threats of litigation against them, the funds again failed to comply, relying on their non-party status.

On January 5, 1995, the receiver filed a subsidiary action, naming the funds and Monga as defendants, seeking orders requiring that the funds turn over to accounts, or judgment against them for the value of the accounts. The receiver also sought a determination that the accounts were not subject to statutory exemptions from claims of creditors

applicable to IRA accounts. The funds moved to dismiss this complaint, along with the earlier contempt complaint, for lack of jurisdiction. The Court (Lenk, J.) addressed this issue in a thorough memorandum of decision, filed on June 2, 1995, holding that the action is one in personam, and that the Court has personal jurisdiction over each of the funds. As to the contempt complaint, however, the Court ruled that the funds' failure to comply with the earlier orders was based on a legitimate question of jurisdiction, along with a well-founded fear of legal action by Monga and of possible conflicting court orders. Accordingly, the Court dismissed the contempt complaint, and the directed the funds to keep the accounts frozen pending subsequent resolution of their status. The funds did so, and counterclaimed for interpleader, seeking authorization to deposit the value of the accounts into the Court, and to be relieved of all further involvement.

Soon thereafter, Monga sued the funds in Pennsylvania. This set off a lengthy and complex series of proceedings in state and federal courts in both Pennsylvania and Massachusetts, with removals and subsequent remands in both places.9 On August 26, 1996, while these proceedings were on-going, Monga died of cancer. Maharaj, whom he had designated as his beneficiary on the IRA accounts, then demanded release of the accounts to her. Along with Edmond J. Brokans, who initially served as administrator of Monga's estate, Maharaj assumed the role Monga had previously played in the litigation. The received filed an amended substituted

complaint, naming Brokans and Maharaj in lieu of Monga.

As matters now stand, the IRA's remain in the hands of the funds, frozen awaiting this Court's orders. The funds seek to turn them over to whomever the Court directs, and to be protected from any further litigation against them with respect to these accounts. Vanguard Fiduciary Trust Company, Vanguard/Morgan Growth Fund, Inc., (collectively "Vanguard") and Investors Fiduciary Trust Company ("IFTC") also seeks authorization to withhold amounts incurred by them for attorneys fees and costs in connection with the litigation. Maharaj contends that the accounts belong entirely to her, as Monga's beneficiary. She contends that she was never a proper party to this action or to the receivership, that the Court lacks jurisdiction over her,10 and that the accounts are fully protected from all creditor claims by statutory exemptions for IRA's.11 The receiver seeks to have the accounts turned over to him, free of any claim of exemption, and without any deduction for the fund's attorneys fees and costs.

As for the funds allegedly for the benefit of the minor, these have been held by the receiver, pursuant to this Court's 1992 orders, in a segregated, but non-interest bearing account. Maharaj seeks an order that these be returned to her, and further, that the receiver be required to make up what she contends these assets could have earned if properly invested over time. The receiver opposes these requests, and seeks a determination that these funds

area available for distribution to creditors of the receivership.

DISCUSSION

Analysis of the issues presently before the Court must begin with the basic proposition that, except in unusual circumstances not shown to be present here, a judge of this Court does not review or reconsider orders previously entered by another judge of this Court in the same case. E.g. King v. Driscoll, 424 Mass. 1, 8 (1996); Peterson v. Hopson, 306 Mass. 597, 599 (1940). If any of the orders previously entered in this case are erroneous, any party aggrieved thereby may invoke applicable appellate remedies. No party, however, is entitled to call upon this Court to undo actions already taken, or to reopen matters previously considered and decided.

That basic proposition is sufficient to dispose of Maharaj's arguments on matters of jurisdiction and her status as a party. The receivership orders entered in 1992 reflect the Court's determination at that time that it had jurisdiction over Maharaj, that she had been provided with sufficient notice and opportunity to be heard, and that sufficient grounds existed for the orders against her. These issues are closed in this Court, and will not be reopened. The Court will disregard the label of "special appearance" on Maharaj's filings, and treat each filing as a motion or opposition, according to the action sought.

As to the IRAs, the same basic principle provides the answer to the dispute between the receiver and Maharaj. The receivership order entered by this

Court in 1992 clearly and unequivocally required Monga to turn over to the receiver all his assets, without limitation. The language of the order leaves no room for argument as to whether it applied to IRAs; clearly it did. Whatever arguments might have been made on appeal as to the legitimacy or correctness of that order, Monga was bound to obey it until such time as it might be overturned by an appellate court. Had Monga obeyed the order, he would have been free, under its plain terms, to present to the Court his contention that some or all of the assets in these accounts were subject to statutory exemptions from claims of creditors, and for that reason should be returned to him. If the Court agreed with that contention, the assets, or some of them, would have been returned to him, and could have then remained in his name at the time of his death, and passed to Maharaj as his beneficiary.

Monga, however, chose not to obey the Court's orders. Just as his "flouting of the judge's orders" effected a waiver of his right to appellate review, 35 Mass. App. at 764-5, Monga's continued defiance of this Court's orders, right until the time of his death, stripped him of all right to assert claims of statutory exemption for these accounts.12 Maharaj's claim to these assets derives entirely from Monga's; she would be entitled to them as his beneficiary only if he had the right to retain them in name at the time of his death. Since he forfeited any such right, nothing remained to pass to her upon his death, and she has no present interest in these accounts. The Court thus has no occasion to consider which of the various statutory exemptions would apply, and what proportion of the assets in the accounts would be

exempt. The accounts are to be turned over, forthwith, to the receiver, for distribution to creditors, subject only to the funds' claims for attorneys fees and litigation costs.

Vanguard and IFTC base their claim for attorney's fees and costs on Article VI, § 6.3, of the Vanguard Individual Retirement Custodial Account Agreement. That provision entitles the custodian to "reimbursement for all reasonable expenses incurred by it in the management of the Account." The same section goes on to provide that "The Custodian's fees shall be changes to the Account ...." The agreement governs and defines the scope of Monga's property rights in the accounts. The receiver, of course, can have no greater rights than Monga had. Thus Vanguard and IFTC are entitled to deduct from the accounts to be turned over their attorney's fees and costs reasonably incurred in connection with litigation relating to these accounts.

The receiver argues that the funds should not recover the full amount of their expenses because they acted unreasonably in failing to comply with this Court's initial orders to turn over the accounts, and in pursuing their challenge to this Court's jurisdiction. These arguments, however, have already been rejected, at least implicitly, in this Court's (Lenk, J.) decision to dismiss the receiver's complaint for contempt against the funds. Although the Court decided it had jurisdiction, contrary to the funds' arguments, it characterized those arguments as "articulate and reasoned." Monga's threatened and actual litigation left the funds no choice but to press their jurisdictional challenge; if they did not, they would risk liability to Monga and/or Maharaj.

possibly including multiple or punitive damages under other states' statutes, in the event that a court elsewhere were to determine that Massachusetts lacked jurisdiction.

The receiver also suggests that Monga's estate should bear the burden of the funds' expenses, since those expenses derive from Monga's conduct in threatening and bringing frivolous litigation. Although the point has considerable appeal as an equitable matter, the plain terms of the custodial agreement compel the conclusion that the funds are entitled to charge their expenses against the accounts.13 Thus, the funds are authorized to withhold the amount of those expenses from the amounts they will turn over to the receiver. Counsel for the funds and the receiver should endeavor to reach agreement as to the reasonable amount of such expenses, and should bring any disagreement before the Court promptly, according to the schedule set forth infra.

The principles already discussed also serve to resolve the dispute between Maharaj and the receiver over the accounts for the benefit of Maharaj's nephew. Under the receivership order, Maharaj was obligated to turn over to the receiver all assets under her control, without limitation. Like Monga, she was bound to obey the order until such time as it might be overturned by order of an appellate court. Had she done so, she would then have been free, under the plain terms of the order, to present to the Court her contention that these accounts should be protected from the claims of creditors and either returned to her or transferred to an appropriate custodian for the benefit of the child. Like her husband, however,

Maharaj chose to flout the Court's orders, and thereby forfeited any right to seek relief. Nor did the child, through his parents, or any other person on his behalf, present a claim to the receiver for his benefit, although the position would appear to fall well with the category of creditors of Maharaj. Accordingly, these accounts are properly assets of the receiver subject to distribution to creditors.

CONCLUSION AND ORDERS

For the foregoing reasons, the Court hereby orders as follows with respect to the pending motions:

The Receiver's "Motion for Sanctions and/or Summary Judgment With Respect to Receiver's Substitute Complaint to Effect Turnover of Accounts,' paper no. 362, is superseded by paper no. 402, and accordingly requires no actions.

The "Special Appearance of Shantee Maharaj, Trustee UTMA of Adiraj Gosine for an Order Directing John Ottenberg to Turnover Funds Belonging to a Minor," paper no. treated as a motion, is DENIED.

The "Special Appearance of Shantee Maharaj Seeking Sanctions Against John Ottenberg for His Abusive Practices, and For Perjury Committed by Ottenberg in His Verified Complaint for Contempt," paper no. 390, treated as a motion, is DENIED.

The Receiver's "Motion to Strike Special Appearance Motions of Shantee Maharaj," paper no. 397, is ALLOWED, to the extent that the denomination

"special appearance" on these papers is disregarded and the papers are deemed motions.

The Receiver's "Motion For Summary Judgment On Receiver's Amended Substitute Complaint To Effect Turnover Of Accounts," paper no. 402, is ALLOWED, and it is hereby ordered that JUDGMENT enter on the Receiver's Amended Substitute Complaint to Effect Turnover Accounts in the form of an injunction directing Vanguard Fiduciary Trust Company, Vanguard/Morgan Growth Fund, Inc., Investors Fiduciary Trust Company, and Founders Funds, Inc., to turn over the accounts, less, in the case of Vanguard Fiduciary Trust Company, Vanguard/Morgan Growth Fund, Inc., and Investors Fiduciary Trust Company, their reasonable expenses incurred in connection with litigation relating to the accounts. Within fourteen days of this order, Vanguard and IFTC shall provide to the receiver the total amount of expenses they claim, with supporting documentation. The receiver and counsel for the funds shall thereafter confer in a diligent and good faith effort to reach agreement on the amount of expenses. If they are unable to do so within thirty days of this order, they shall present the dispute to the Court in the form of a joint motion, accompanied by memoranda setting forth particular matters in dispute and the position of each side, along with supporting documentation.

The "Motion of Edmund J. Brokans, Administrator of the Estate of D. Dev Monga, Deceased, to Dismiss Receiver's Amended Substitute Complaint to Effect Turnover of Accounts and/or For Summary Judgment," paper no. 404, is DENIED.

The "Special Appearance Motion by Shantee Maharaj to Dismiss Receiver's Amended Substitute Complaint to Effect Turnover of Accounts Pursuant to Mass. R. Civ. P. 12(b), and Opposition to Receiver's Motion for Sanctions and/or Summary Judgment," paper no. 405, treated as a motion, is DENIED.

The "Special Appearance by Shantee Maharaj to Record Judgment of Another State Against John C. Ottenberg," paper no. 407, treated as a motion, is DENIED.

The "Renewed Motion of Vanguard and IFTC for Interpleader," paper no. 413, is ALLOWED, and it is hereby ordered the JUDGMENT enter on Vanguard and IFTC's complaint for interpleader in the form indicated in paragraph 5 hereof, with the additional provision that Shantee Maharaj be permanently enjoined from instituting or prosecuting against Vanguard, IFTC, or any of them, any proceeding in any state or United States or administrative tribunal regarding the Monga IRA Accounts.

The "Special Appearance Motion by Shantee Maharaj to Direct John Ottenberg to Immediately Invest the Minor, Adiraj Gosine's Education Trust Funds with Legg Mason Value Trust," paper no. 412 and 415, treated as a motion, is DENIED.

The "Emergency Motion of Shantee Maharaj by Special Appearance for an Order Directing John Ottenberg to Turnover Maharaj's Funds to Retain Massachusetts Counsel," paper no. 414, is DENIED.

The Motion of Founders Funds, Inc., for Interpleader," paper no. 417, is ALLOWED, and it is hereby ordered the JUDGMENT enter on Founders Funds, Inc.'s counterclaim for interpleader in the form of an injunction directing Founders Funds, Inc., to turn over the Monga IRA accounts to the receiver, with the additional provision that Shantee Maharaj be permanently enjoined from instituting or prosecuting against Founders Funds, Inc., any proceeding in any state or United States court or administrative tribunal regarding the Monga IRA Accounts.

The "Special Appearance Motion to Strike, and Reply by Shantee Maharaj to Receiver's Opposition to Motion by Shantee Maharaj to Direct Receiver to Invest Funds with Legg Mason Value Trust," paper no. 422, treated as a motion, is DENIED.

"Shantee Maharaj's Emergency Ex-Parte Motion by Special Appearance for an Order Directing John Ottenberg to Advance Travel Expenses So That Maharaj May Travel to Massachusetts On Sept. 10, 1998," paper no. 431, treated as a motion, is DENIED.

The "Special Appearance Motion for Leave to File Corrected Version of Reply Memo By Shantee Maharaj & the Estate of D. Dev Monga to Paul Sommer & John Ottenberg's opposition to Maharaj & Monga's Motion to Dismiss," paper no. 443, treated as a motion, is ALLOWED.

The "Motion for Leave to File Three Attached Pleadings," dated September 28, 1998, paper no. 447, is ALLOWED.

The "Special Appearance by Shantee Maharaj to Quash Service, and to Dismiss Complaint for Contempt Based on Ottenberg's Ongoing Perjured Testimony". Paper no 407.5, requires no action, since the receiver has voluntarily dismissed his most recent complaint for contempt.

The "Motion of Defendant Dev Monga to Dismiss Receiver's Substitute Complaint to Effect Turnover of Accounts," paper no. 341, is DENIED.

"John C. Ottenberg, Receiver's Motion for Sanctions Against Shantee Maharaj Monga, Edmund J. Brokans, Esq. For Their Failure to Respond to a Request for Production of Documents," paper no. 396, was withdrawn by the receiver at the hearing on September 28, 1998.

Judith Fabricant
Justice of the Superior Court
October 8, 1998

1 Additional defendants in the original underlying action were Core Environmental Resources, Inc. and Subsurface Technologies, Inc. After entry of judgment on the original claims, Monga's wife, Shantee Maharaj, and a third corporation, Environmental Management, Inc., became parties to receivership orders entered by the Court in enforcement of the judgment, and John Ottenberg

became a party in his role as court-appointed receiver. Thereafter, Maharaj was named as a defendant in two complaints for contempt filed by Ottenberg. After Monga's death in 1996, Edmund J. Brokans, administrator of Monga's estate, was substituted for Monga. Maharaj later replaced Brokans as administrator. Subsequent complaints filed by the receiver, in 1994 and 1995, and amended at later dates, added Vanguard Fiduciary Trust Co., Vanguard/Morgan Growth Fund, Inc., Founders Funds, Inc., Citadel Service Co., Franklin Administrative Service, Inc., Franklin Utilities Fund, Franklin Custodian Funds, Inc., and Franklin Utilities Fund were dismissed by stipulation on February 28, 1995.

2 It appears that Monga's wife, Shantee Maharaj, was also employed in the business.

3 The parties have submitted voluminous filings on these motions, including, in additions to supporting memoranda, numerous affidavits, reply memoranda, supplemental memoranda, and the like. As to some of the various materials submitted, objections have been raised on timelines or other procedural grounds. The Court overrules each of these objections, and has reviewed and considered all of the materials submitted by all parties on each of the pending motions, as well as the oral arguments presented.

4 The motion for appoint of a receiver expressly included Maharaj, requesting that a receiver be appointed "to take possession of all of the property and assets of the defendants, Core Environmental & Engineering Resources, Inc, (now Core

Environmental Resources, Inc.) ('Core'), Subsurface Technologies, Inc. ('Subsurface'), and D. Dev Monga ('Monga') and of Monga's wife, Shantee Maharaj Monga ('Maharaj')." Pursuant to the Court's order for the alternative service, a copy of the motion, and notice of hearing on the motion, was served on all those named, along with the summons and complaint for contempt, by a deputy sheriff, "by giving in hand to Don Behoury, Office Manager" of Subsurface Technologies, Inc., and of Core Environmental and Engineering Resources, Inc.

5 Envirotech Management, Inc.

6 According to recent filings submitted by the fund entities, the IRA accounts had a total value, as of the end of June, 1998, in the range of $170,000. The Central Cooperative Bank account held, as of the date of its transfer to the receiver, $2,645.01. The Fidelity UTMA account was valued at $4488.07 when it was transferred to the receiver.

7 Maharaj was accompanied at that hearing by a boy whom she identified as Gosine, and whose appearance was consistent with the 1988 birthdate she provided. By way of challenging the receiver's efforts to locate him, she pointed out his parents' listing in a Boston telephone book. She did not however, suggest any means by which the receiver could have learned the parents' names without her cooperation. The child's presence, as well as Maharaj's statement to the Court that his parents were unhappy with her for having jeopardized funds held for his benefit, indicates at least by implication that the child's parents are aware of these

proceedings. Nevertheless, nothing in the record indicates that his parents have ever sought to intervene, submitted a claim to the receiver, or otherwise attempted to assert his interests in these assets. The records provide no indication of the reason for their silence. It is worth noting that among the documentation regarding alleged fraudulent transfers provided to the Court in 1992 was information indicating that, in 1990 and 1991, Maharaj transferred a total of some $113,000 to Sharmattie and Sukuldoe Gosine, who deposited that money in Canada.

8 Claims received, according to affidavits submitted by the receiver, included those of creditors of both Monga and Maharaj, unrelated to the dispute underlying these proceedings. One such claim is a judgment for $301,709.56 against both Monga and Maharaj arising from litigation with the trustees of a condominium in which they had owned a unit.

9 The federal court action in Massachusetts led to awards of sanctions against both Monga and Maharaj for filing frivolous pleadings. On November 22, 1995, Monga removed the case to the United States District Court for Massachusetts. On March 13, 1996, the federal court ordered the case remanded to this Court, and awarded sanctions against Monga in the amount of $1,321.50. On December 6, 1996, Shantee Maharaj again removed the case to the United States District Court for Massachusetts. On February 26, 1997, the federal court ordered the case remanded to this Court, and awarded sanctions against Maharaj in the amount of $1,968.75. These amounts remain unpaid to date.

10 To protect her position on this theory, she has denominated all her papers in this Court with the label "special appearance".

11 Maharaj rests this argument primarily on statutes of Pennsylvania and Missouri, where the funds have their principal places of business. Her fall-back position on this point invokes G.L. c. 235, § 34A.

12 A contrary ruling on this point could lead to the obviously unjust result that, having succeeded in transferring assets not subject to any statutory exemption, Monga would have nevertheless received the benefit of such protection for the principal assets remaining within the Court's reach.

13 The receiver may have a potential claim against the estate of Monga, and/or against Maharaj, for dissipating the value of the accounts by threatening and pursuing frivolous litigation against the funds. Before seeking leave to pursue any such claim, the receiver should consider the cost of pursuing it, its potential value, and the likelihood of actually collecting any judgment that might be obtained.

APPENDIX L

The United States District Court
for the Eastern District of Pennsylvania

95-5235

Dated June 13, 1996
Filed June 13 1996

MEMORANDUM AND ORDER

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA
CIVIL ACTION
NO. 95-5235

D. DEV MONGA :
v.
JOHN C. OTTENBERG, :
et al.

ENTERED: _____6/14/96___

MEMORANDUM AND ORDER

HUTTON, J. June 11, 1996

Presently before this Court is defendants John C. Ottenberg and Berry, Ottenberg & Dunkless' Motion to Dismiss Plaintiff's Complaint and the plaintiff's response thereto.

BACKGROUND

The facts of this case are intricately involved with several actions filed in Massachusetts State court and another action in this district (C.A. No. 95-6637). In 1989, defendant Paul Sommer ("Sommer"), a former business partner of the plaintiff, D. Dev Monga ("Monga"), sued Monga in Massachusetts State court for breach of contract and breach of fiduciary duty. A verdict was entered in favor of Sommer in the amount of $478,904.03 and the State court also entered injunctive orders that prohibited Monga from transferring his assets away from Massachusetts. Despite the Court's injunctive orders,

Monga apparently did transfer his assets in an attempt to frustrate satisfaction of the judgment. Accordingly, the Massachusetts State court appointed the defendant, John Ottenberg ("Ottenberg"), as Receiver to collect Monga's assets.

As court appointed Receiver, Ottenberg obtained an Order from the Massachusetts State Court that required the defendants Vanguard Fiduciary Trust Company and Investors Fiduciary Trust Company (collectively "the Funds") to turnover the assets in Monga's individual retirement accounts ("IRAs") to Ottenberg. The Funds, however, refused to comply with the court order after Monga had apparently threatened to sue the Funds if the assets were released. Ottenberg, therefore, initiated a separate lawsuit in Massachusetts State court to obtain Monga's assets from the Funds. This action is apparently still pending.

Subsequently, Monga filed two separate actions in Pennsylvania. The first action was brought in the Court of Common Pleas for Montgomery County, Pennsylvania against, inter alia, Ottenberg and the Funds. Monga requested a declaration that the monies in his IRA's were exempt from creditor claims brought by Ottenberg. This action was eventually removed to this Court and assigned to the Honorable James T. Giles. See Monga v. Ottenberg, C.A. No. 95-6637 (E.D. Pa.). On January 26, 1996, Judge Giles dismissed the first action brought by Monga for lack of personal jurisdiction over Ottenberg. Finally, on April 15, 1996, after conducting a hearing, Judge Giles denied Monga's motion for reconsideration.1

The second action brought by Monga – -i.e., the present case now before this Court --- was filed on August 15, 1995 against various defendants that included, inter alia, Ottenberg, the Funds, and Ottenberg's law firm Berry, Ottenberg & Dunkless ("Dunkless"). In this action, Monga has requested declaratory relief as well as damages, and has raised several causes of action – - e.g. tortious interference with contract, abuse of process, breach of contract and conversion.

DISCUSSION

The Ottenberg and Dunkless Defendant now move this Court for an Order dismissing the plaintiff's complaint. In their motion, the defendants have raised the following issues: (1) personal jurisdiction over the defendants; (2) venue; and (3) failure to state a claim upon which relief can be granted. Based on the following reasons, this Court finds that it does not have personal jurisdiction over the Ottenberg and Dunkless Defendants and, and therefore, the plaintiff's claims against these defendants shall be dismissed.2

The Ottenberg Defendant

In Civil Action No. 95-6637, the Honorable James T. Giles recently determined that this Court lacked personal jurisdiction over Defendant Ottenberg. Accordingly, I conclude that Monga is now precluded, based upon Judge Giles' early ruling, from relitigating the issue of personal jurisdiction in this matter with respect to Defendant Ottenberg.

The doctrine of issue preclusion "derives from the simple principle that 'later courts should honor the first actual decision of a matter that has been actually litigated.' Burlington Northern Railroad Co. v. Hyundai Merchant Marine Co., 63 F. 3d 1227, 1231 (3d Cir. 1995) (quoting 18 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE Sect. 4416 (1981)). This doctrine ensures that "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." Montana v. United States, 440 U.S. 147, 153 (1979). Four requirements must be satisfied in order for the doctrine of issue preclusion to apply: (1) issue decided in the prior case must have been identical with the issue presented in the later matter; (2) the issue was actually litigated; (3) there was a final and valid judgment; and (4) the issue was essential to the prior judgment. Burlington Northern, 63 F.3d at 1231-32; see also In re Graham, 973 F. 2d 1089, 1097 (3d Cir.1992) (quoting In re Braen, 900 F.2d 621, 628-29 n. 5 (3d Cir.1979), cert. denied, 498 U.S. 1066 (1991)).

Based upon the facts of this case, it is clear that the doctrine of issue preclusion prevents relitigation of the question as to whether this Court has personal jurisdiction over Ottenberg.3 First, with respect to the question of specific jurisdiction, the issue of whether the cause of action arose from Ottenberg's activities was a subject of Civil Action No. 96-6637. Second, Judge Giles reached the merits of the

specific jurisdiction question.4 Third, the Court's decision with respect to specific jurisdiction was a final and valid judgment.5 Finally, the determination that the court lacked personal jurisdiction over Ottenberg was essential to Judge Giles' decision in Civil Action No. 95-6637.6

With respect to the issue of general jurisdiction, a court must evaluate all of a defendant's contacts with the forum until the time of service of process. See Brennan v. Walt Disney Productions Inc., CA No. 84-5812, 1986 WL 9488, at *3 (E.D. Pa. Aug. 28, 1986); Cohen v. Rosengarten, 88 F.R.D. 568, 570-71 (E.D. Pa. 1980); Strick Corp. v. Cravens Homalloy Ltd., 352 F.Supp. 844, 846 (E.D. Pa. 1972). Thus the forum State may obtain jurisdiction over a defendant in a subsequent action if the defendant has established additional contacts after service in the first action but prior to service in the second.7 Monga, however, has failed to produce any evidence of "continuous and systematic" contacts with Pennsylvania that took place between the two dates of service. Thus, the issue with respect general jurisdiction in this action is no different from that presented in the prior action and, therefore, the doctrine of issue preclusion does prevent this Court from considering whether Ottenberg is subject to general jurisdiction.8

The Dunkless Defendant

Upon reviewing the plaintiff's pleadings and response to the current motion, this Court finds that Monga has failed to present any separate/distinct evidence to establish either specific or general jurisdiction over the Dunkless Defendant. In fact,

Monga has failed to make any distinction between the Ottenberg and Dunkless Defendants for purposes of personal jurisdiction. Accordingly, this Court also finds that the Dunkless Defendant has not made a purposeful incursion into Pennsylvania such that this Court may exercise personal jurisdiction over the law firm.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
CIVIL ACTION

:

D. DEV MONGA ::

v.

JOHN C. OTTENBERG, :
et al. : NO. 95-5235

O R D E R

AND NOW, this 11th day of June, 1996, upon consideration of Defendants John C. Ottenberg and Berry, Ottenberg & Dunkless' Motion to Dismiss Plaintiff's Complaint and the Plaintiff's response thereto, IT IS HEREBY ORDERED that the Defendants' Motion is GRANTED.
IT IS FURTHER ORDERED that the Plaintiff's claims against Defendants John C. Ottenberg and Berry, Ottenberg & Dunkless are DISMISSED.
BY THE COURT:

"s/Herbert J. Hutton"
Herbert J. Hutton, J.

1 In his order denying the Motion to Reconsider, Judge Giles stated that "[t]the court, in accordance with its Order dated January 26, 1996, finds that Mr. Ottenberg has not made a purposeful incursion into Pennsylvania such that this court may exercise in personam jurisdiction over him."

2 Whereas this Court will grant the Defendants' motion due to lack of jurisdiction, I will not address the remaining issues raised by the Defendants.

3 Under Pennsylvania's long-arm stature and the due process clause of the Constitution, the determination of whether personal jurisdiction exists over a defendant is a two-step analysis. First, the court must determine whether it has "specific jurisdiction" by determining whether the cause of action arose from the defendant's forum related activities. Gehling v. St. George's School of Medicine, Ltd., 773 F.2d 539, 541 (3d Cir. 1985). If so, "defendant's conduct and connection with the forum State...[must be] such that he should reasonably anticipate being haled into court there." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 256 (1980). The defendant must have "purposely avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Hanson v. Denckla, 357 U.S. 235, 253 (1958). Furthermore, subjecting the defendant to jurisdiction in a Pennsylvania court can not offend traditional notions of fair play and substantial justice. Gehling, 773 F.2d at 541 (citing International Shoe Co. v. Washington, 326 U.S. 310 (1945)).

Second, if the claim does not arise from defendant's forum related activities, then the court must determine if it has "general jurisdiction" over the defendant. Under this type of jurisdiction, the plaintiff must show that the defendant has maintained "continuous and systematic" contacts with the forum to satisfy the requirements of due process. Mellon Bank (East) PSFS v. Diveronica Bros., Inc., 983 F.2d 551, 554 (3d Cir. 1993).

4 In his opinion, Judge Giles specifically stated:
Although Monga asserts Ottenberg has attempted to seize funds located in the Commonwealth [of Pennsylvania], he has failed to present evidence to show that Ottenberg, in an effort to do so, directed any activity in Pennsylvania.
Ottenberg has not registered the Massachusetts judgment here, nor has he obtained a writ of execution from a court in this jurisdiction. Instead, all matters relating to Ottenberg's attempt to enforce the Sommer's judgment have originated in, and have been conducted in Massachusetts.

Monga v. Ottenberg, C.A. No. 95-6637, slip op. at 6 (E.D. Pa. January 26, 1996).

5 After conducting a hearing on a motion to vacate/reconsider the Order dated January 26, 1996 which was filed by Monga, the Court issued a subsequent order dated April 15, 1996/ In this second order, the Court reiterated its previous finding that it lacked personal jurisdiction over Ottenberg and denied Monga's motion.

6 In fact, the court dismissed the entire action once it determined that Monga had not established the existence of in personam jurisdiction over Ottenberg.

7 In this case, Ottenberg was served with Monga's Amended Complaint on December 4, 1995. The date when Ottenberg was served in Civil Action No. 95-6637, however, is uncertain from the record. Nevertheless, the record in civil action 95-6637 is clear that Ottenberg filed his notice of removal on October 18, 1995.

8 This Court does find that the remaining three requirements under the doctrine of issue preclusion have been met with respect to the issue of general jurisdiction.

APPENDIX M

United States District Court for the Eastern District
of Pennsylvania
CA No. A. 95-6637

Dated April 19, 1996

MEMORANDUM AND ORDER

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
APRIL 15, 1996 CIVIL ACTION NO. 95-6637
D. DEV MONGA
v.
JOHN E. OTTENBERG, ET AL.

ORDER

AND NOW, this 15th day of April, 1996, after a hearing on Plaintiff's motion to vacate/reconsider (Docketed at #14), and for the reasons stated of record on March 22, 1996, it is hereby ORDERED that the motion is DENIED.

The court, in accordance with its Order dated January 26, 1996, finds that Mr. Ottenberg has not made a purposeful incursion into Pennsylvania such that this court may exercise in personam jurisdiction over him. Mr. Ottenberg's actions to marshall the assets of Mr. Monga were directed by, and executed at the behest of, the Massachusetts Superior Court. At all relevant times Mr. Ottenberg acted in a Receivership capacity only. Further, actions undertaken by him to execute the orders of the Massachusetts Court were conducted from Massachusetts.

Even if this court could exercise in personam jurisdiction over Mr. Ottenberg, we would decline to do so under well established principles of comity which permit this court to defer to the jurisdiction of the Massachusetts state court where identical issues

are currently being litigated by the same parties as here, including plaintiff.

IT IS FURTHER ORDERED that the motion of Vanguard Fiduciary Trust Company ("Vanguard") and Investors Fiduciary Trust Company ("IFTC") to dismiss (Docketed at # 22) is GRANTED

Presently, there is no case or controversy before this court. The retirement funds at issue have not been released to Mr. Ottenberg and an action is pending before a state court in Massachusetts to adjudicate the identical issues raised by the plaintiff in this matter: whether the retirement funds held in Pennsylvania (and Colorado) may be marshalled to pay a Massachusetts civil judgment against Mr. Monga. Prior to the commencement of this federal action, the Massachusetts trial court had already determined, after argument, that it had jurisdiction over the parties and the subject matter of Plaintiff's claim. See Ottenberg v. Vanguard Fiduciary Trust Company et al., No. 89-2951 (Middlesex Superior Ct. filed June 7, 1995). Apparently, that court believed that the contested retirement funds had been located in Massachusetts at the time the judgment against Mr. Monga was entered and that Mr. Monga had transferred those funds, in dereliction of the court's order, to other jurisdictions. The Funds have resisted that court's order asserting that the contested monies were never retained in Massachusetts. Additionally, the Funds apparently realized that their liability to Mr. Monga may not be extinguished by compliance with the order of the Massachusetts court. Mr. Monga insists that his retirement funds

are subject of adjudication in Pennsylvania because the money is located here. Mr. Ottenberg has not attempted to execute upon the Massachusetts judgment by domesticating it in the domiciliary states consistent with the Full Faith and Credit Clause of the United States Constitution. Mr. Ottenberg brought the Massachusetts action as Receiver when Mr. Monga refused to turn over the monies held in the account pursuant to court order, and the Funds, upon threat of litigation by Mr. Monga, also refused to comply with orders issued by the Massachusetts court to deliver the retirement monies to Mr. Ottenberg. Mr. Monga, like the Funds, has vigorously contested the Massachusetts court's jurisdiction.

Nonetheless, we conclude that principles of comity dictate that deference be given to the Massachusetts state court system. Vanguard and IFTC have participated in the pending Massachusetts proceeding. Presently, the funds are challenging the exercise of jurisdiction on the Massachusetts court over the retirement res and have asked this court to allow them to litigate the jurisdictional issue in one forum at a time. Nothing this court could do, even if it exercised personal jurisdiction over Mr. Ottenberg, would relieve the Funds of their present obligation to press to conclusion those issues in the Massachusetts court. At best, if this court were to finds in Plaintiff's favor, the Funds would be subject possibly to adverse rulings in three jurisdictions such that the matter would require reconciliation by the United States Supreme Court. Deference to the Massachusetts court may resolve the issues sufficiently such that inconsistent rulings between states will be avoided.

Moreover, should the Massachusetts court order become final, and remain adverse to the Funds, the Funds could file an action in federal court in Pennsylvania seeking a declaratory judgment as to the ownership of the monies. A Massachusetts order requiring the release of the monies to Mr. Ottenberg would not insulate the Funds from an action for damages by Mr. Monga.

Accordingly, we conclude that it is in the interests of all parties and in this court's interest in the finality of litigation and the preservation of resources that this matter be DISMISSED as to ALL DEFENDANTS without prejudice.

IT IS FURTHER ORDERED that the Funds' motion to transfer this matter to Massachusetts (Docketed at # 22) is DENIED as moot.

BY THE COURT:
"s/James L. Giles"
J.

APPENDIX N

Massachusetts Superior Court
CA No. 89-2951

Dated June 1, 1995

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION TO DISMISS THE COMPLAINT FOR CONTEMPT.

COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX, SS. SUPERIOR COURT
CIVIL ACTION NO. 89-2951

June 1, 1995

JOHN C. OTTENBERG, receiver1 vs. VANGUARD FIDUCIARY TRUST CO., & another2

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION TO DISMISS THE COMPLAINT FOR CONTEMPT

This case is before the court on: (1) the request of the plaintiff, John C. Ottenberg ("Receiver"), acting as receiver of D. Dev Monga and Core Environmental Resources Inc., ("Core Environmental"), for a preliminary injunction; (2) the motions of defendants, Vanguard Fiduciary Trust Co., Vanguard Morgan Growth Fund, Founders Funds, Inc., Citadel Service Co., Inc., and Investors Fiduciary Trust Co. to dismiss the Receiver's complain and his substitute complaint to effect turnover of accounts; and (3) the Vanguard defendant's separate motion to dismiss the contempt complaint brought against them by the Receiver.

On September 23, 1994, the Receiver brought an action for contempt against the Vanguard defendants as a result of their failure to comply with earlier orders of this court instructing the Vanguard defendants to turn over to the Receiver certain funds representing Monga's mutual fund shares in a

Vanguard IRA mutual fund account. On January 5, 1995, the Receiver filed a complaint against all defendants seeking a preliminary injunction and declaratory judgment instructing the defendants to turn over to the Receiver all accounts in the name of Monga or Core Environmental. On February 17, 1995, the Receiver filed a conversion, specific performance, and enforcement of judgment against all defendants. Additionally, the substitute complaint added a count against Monga seeking to determine whether the various mutual funds IRA accounts are valid IRA accounts and, as such allegedly exempt from attachment by creditors.

Pursuant to Mass. R. Civ. P. 12(b), all defendants now move to dismiss the substitute compliant and defendants Vanguard Fiduciary Trust Co. and Vanguard Morgan Growth Fund (the "Vanguard defendants") also move to dismiss the contempt complaint. Defendants assert that because this court lacks jurisdiction over the mutual fund shares, it does not have jurisdiction to consider any of the claims in this case or to issue valid orders to defendants regarding such shares, the violation of which orders could subject defendants to contempt. For the reasons set forth below: (1) the Receiver's request for a preliminary injunction in denied; (2) defendants' motions to dismiss the Receiver's complaint to effect turnover of accounts is denied; and (3) the Vanguard defendants' motion to dismiss the contempt complaint is denied on the grounds stated. However, pursuant to Mass. R. Civ. P 65.3 (a) (3) and this court's inherent discretion in exercising its contempt power, this court dismisses the contempt complaint without prejudice.

BACKGROUND

The actions now before the court stem form an underlying lawsuit in which plaintiff Paul F. Sommer obtained a final judgment against Monga and Core Environmental. On June 15, 1992, this court appointed John C. Ottenberg as receiver of Monga and Core Environmental. Subsequently, this court ordered Monga to turn over his mutual fund IRA accounts tor the Receiver. Monga refused to comply with the court's order. Monga's refusal to turn over the mutual fund accounts let the Receiver to seek court orders instructing the Vanguard defendants, Founders Funds, Inc., and Citadel Service Co., Inc., as the custodians of the IRA accounts, to turn over any accounts in the name of Monga or Core Environmental. On July6, 1992, and August 20, 1992, this court issued orders instructing defendants to turn over the mutual fund accounts.3

Monga countered, the court is informed, by threatening that if defendants delivered any of the accounts to the Receiver, he would take legal action against the defendants.4 Faced with opposing threats, defendants froze the accounts of Monga and Core Environmental. This action prevented Monga from redeeming the shares or otherwise depleting the assets in the accounts. The Receiver continued to make demands upon defendants that they comply with the court's orders. Defendants, however, refused to comply.

On September 26, 1994, the Receiver filed a complaint seeking to have defendants adjudged as being in contempt of this court's orders.5 On January 5, 1995, the Receiver also filed a complaint against defendants seeking a preliminary injunction and declaratory relief instructing defendants to turn over the mutual fund accounts. On February 17, 1995, the Receiver filed a substitute complaint adding counts for breach of contract, specific performance, conversion, and enforcement of judgment against all defendants. The substitute complaint also added a count against Monga seeking to determine the validity of the IRA status of the various mutual fund accounts.

Defendants now move to dismiss the complaint and the substitute complaint to effect turnover of accounts. The Vanguard defendants also move to dismiss the contempt complaint.

DISCUSSION

Validity of The Court's Jurisdiction

Resolution of the jurisdictional issues presented here requires this court to summarize briefly some of the basic, yet ever opaque, concepts of jurisdiction. First, the court must decide whether an action should be characterized as in rem, quasi in rem, or in personem in nature. Joseph R. Nolan, Civil Practice, § 62, at 68 (1992). "An action is in rem if it is directed against property, itself, as in admiralty, ... or unknown in res." Joseph R. Nolan, supra, § 63, at 69; see also Tyler v. Judges of the Court of Registration, 175

Mass. 71, 75-77 (1900) (discussing the nature of in rem actions and what is meant when it is said that "a judgment in rem runs against the property [and] some interest therein." Joseph R. Nolan & Laurie J. Sartorio, Equitable Remedies, § 102, at 176 (1992). Except for the probate of a will, the "instances in which a court acts strictly in rem [as to personal property] are negligible." Joseph A. Nolan & Laurie J. Sartorio, supra.

A quasi in rem action is "a proceeding involv[ing] a res" where "only the rights of certain named persons are sought to be affected in the proceeding..." Joseph R. Nolan, supra, § 64, at 71. Examples of quasi in rem actions include actions to reach and apply property, actions involving trusts, and suits to determine the validity of mortgages or other encumbrances in land. Joseph R. Nolan & Laurie J. Sartorio, supra, § 83. At 154-155 n. 7.

If an action "runs against the person and seeks to establish the personal liability of the defendant, whether the action be in contract or tort, the action is classified as a personal action, or an action in personam." Joseph R. Nolan, supra, 65, at 72; see also Tyler v. Judges of the Court of Registration, supra, at 76, in which then Chief Justice Holmes noted that "if the technical object of the suit is to establish a claim against some particular person, with a judgment which generally, in theory at least, binds his body, or to bar some individual claim or objection, so that only certain persons are entitled to be heard in defence, the action is in personam.

although it may concern the right to or possession of a tangible thing").

Here, the Receiver's substitute complaint brings counts against all defendants for breach of contract, conversion, specific performance, a declaratory judgment, and enforcement of judgment. The substitute complaint also contains a count against Monga alleging fraud in the establishment of the various IRA accounts. The counts for breach of contract, conversion, specific performance, and fraud are in personam actions. These actions are not in rem actions. The Receiver's claims only seek to clarify the interest of the Receiver and defendants in the IRA accounts. The claims do not "seek to bar the interest of all persons, known and unknown in the res." See Joseph R. Nolan, supra, § 63, at 69. Nor are these quasi in rem actions. As noted above, quasi in rem actions traditionally encompass a narrow class of actions concerning interest in real property, trusts, and actions to reach and apply. Rather, the claims for breach of contract, conversion, specific performance, and fraud fall within the definition of an in personam action. Although these claims ultimately concern "the right to or possession of" the funds in the IRA accounts, the claims for breach of contract, conversion, specific performance, and fraud, "seek to establish the personal liability" of defendants. See Joseph R. Nolan, supra, § 65, at 72 (defining actions in contract and tort as being in personam actions); and also Tyler v. Judges of the Courts of Registration, supra. Thus, the Receiver's claims for breach of contract, conversion, specific performance, and fraud are in personam actions.

The substitute complaint also seeks equitable remedies in the form of a preliminary injunction, declaratory judgment, and enforcement of a judgment. In Massachusetts, "equity acts in personam and not in rem. Joseph R. Nolan & Laurie J. Sartorio, Equitable Remedies, § 51, at 74 (1992); see id., infra, §81, at149-150 (noting that "[t]his maxim has become fairly fixed in the law of this Commonwealth as regards equitable relief is considered as one in personam").6 In light of this rule, therefore, the Receiver's equitable claims are also properly characterized as in personam actions. Having determined that Receiver's complaints present in personam actions, this court now turns to the second tier of the analysis, the jurisdictional prerequisites.

Deciding whether the court has jurisdiction to hear the in personam actions now before it requires this court to engage in a "dual inquiry as to the power over the persons of the parties." Joseph R. Nolan, supra, § 62, at 68. Subject matter jurisdiction is defined as the court's "power or competence to decide the kind of controversy that is involved" in a particular lawsuit. Jack H. Freidenthal, Mary K. Kane, & Arthur R. Miller, Civil Procedure, § 2.1 at 8 3d ed. 1993). The Superior Court shares concurrent jurisdiction with the Supreme Judicial Court over all matters of general equity jurisdiction. G.L. c. 214, § 1 (1992 ed.). Rooted in this general equity jurisdiction is this court's contempt power. New England Novelty Co. v. Sandburg, 315 Mass. 739, 746, cert. denied, 323 U.S. 740, 746 (1944); see also John M. Connors, The Law of Contempt in Massachusetts: An Overview, 63 Mass. L.Q. 161 (1978), as well as this

court's authority to issue preliminary injunctions, Packaging Industries Group, Inc., v. Cheney, 380 Mass. 609, 616 (1980), to require specific performance, Noves v. Bragg, 220 Mass. 106, 109 (1915; see also Joseph R. Nolan and Laurie J. Sartorio, supra, § 264, at 426-427, and to enforce judgments, Byron v. Concord National Bank, 299 Mass. 483, 443-444 (1938). General Laws c. 231A, § 1 (1992 ed.), sets forth this court's authority to make binding declaratory judgments. Donald R. Simpson and Howard J. Alperin, Summary of Basic Law, §1192, at 47-48 (1974); see also Joseph R. Nolan & Laurie J. Sartorio, supra, § 281, at 431-432. Likewise, G.L. c. 212, § 4 (1992 ed.) grants this court original jurisdiction over all civil actions, including breach of contract and the tort of conversion. Through defendants various motions to dismiss, defendants appear to challenge this court's subject matter jurisdiction over the contempt complaint and the subsequent complaints to effect turnover of accounts.7 In challenging this court's jurisdiction, defendants begin with the indisputable proposition that subject matter jurisdiction is a prerequisite to the court's ability to hear a dispute. Here, defendants insist, the subject matter of the dispute are the shares in mutual fund IRA accounts of Monga and Core Environmental that are held be defendants. Since the mutual fund shares are intangibles, defendants continue, a court only has jurisdiction over the shares if the shares are physically located within the court's territorial boundaries. Defendants point out that the account shares in the names of Monga and Core Environmental are uncertificated and not located in Massachusetts. Thus, defendants

conclude that this court lacks jurisdiction over the funds in the accounts.

Defendants' argument appears to confuse the concepts of jurisdiction outlined above. Defendants challenge to the court's subject matter jurisdiction is, in substance, actually a challenge to the jurisdictional prerequisites needed for this court to exercise in rem or quasi in rem jurisdiction. As such, defendants' challenge to the court's subject matter jurisdiction is unpersuasive. Thus, this court has subject matter jurisdiction over the counts in the Receiver's complaints. This court now turns to the issue of personal jurisdiction.

Personal jurisdiction refers to the power of the court award a judgment that imposes personal liability on the defendant. Massachusetts Rule of Civil Procedure 12(b) (2) provides that a defendant may move to dismiss a complaint for lack of jurisdiction over the person. Rule 12(h) (1), however, states that a defendant waives lack of jurisdiction over the person as a defense if the defendant fails to include it in a Rule 12 (b) motion.

Here defendants appear to concede that this court has person jurisdiction over them. The Receiver's opposition to defendant's motion to dismiss the first complaint to effect turnover of accounts asserts that the court has personal jurisdiction over defendants because, in essence, defendants have sufficient contacts with, and did business in, Massachusetts. In responding to the Receiver's argument, defendants did not dispute the presence of personal jurisdiction.

Rather, defendants only challenged the court's subject matter jurisdiction. At the very least, however, by failing to raise lack of personal jurisdiction as a defense pursuant to Mass. R. Civ. P. 12 (b) (2), defendants have waived this defense. Mass. R. Civ. P. 12(h) (1).

In sum, having found that this court has subject matter jurisdiction over the claims before it and because defendants have waived any challenge to this court's jurisdiction over their persons, this court has jurisdiction to consider the actions contained in the Receiver's complaints.8

The Receiver's Request for a Preliminary Injunction

The Receiver's complaint to effect turnover of accounts and his later substituted complaint to effect turnover of accounts both request this court to issue a preliminary injunction ordering defendants to turn over all funds in any accounts held be defendants in accounts standing in the names of "Dharam D. Monga, IRA", or "Core Environmental Engineering Resources Inc." In determining whether to grant a preliminary injunction, this court considers the balancing test set forth in Packaging Industries Group Inc. v. Cheney, 380 Mass. 609, 616-617 (1980). See also Planned Parenthood League of Massachusetts, Inc. v. Operation Rescue, 406 Mass. 701, 710 (1990). First, the court must evaluate, in combination, "the moving party's claim of injury and its chance of success on the merits." Id. at 617. If failing to issue the injunction "would subject the moving party to a substantial risk of irreparable

harm, this court must then balance this risk against any similar risk of irreparable harm which granting the injunction would create for the opposing party." Id. "In the context of a preliminary injunction, the only rights which may be irreparably lost are those not capable of vindication by a final judgment, rendered either at law or in equity." Id. at 617 n.11. Moreover, in appropriate cases the court should also consider the risk of harm to the public interest. GTE Products Corp. v. Stewart, 414 Mass. 721, 723 (1993). Finally, a preliminary injunction is a drastic remedy that a court should not grant unless the movant, by a clear showing, carries its burden of persuasion. Charles Wright and Arthur Miller, 11 Federal Practice and Procedure, §2948, at 428-429 (1973).

To satisfy his burden of persuasion concerning the preliminary injunction, the Receiver only relies on his likelihood of succeeding on the merits. The Receiver contends that the receivership order and the merits subsidiary thereto, which clearly and unequivocally establish his claim of right to possession and control of the funds in the accounts held by defendants, are sufficient in and of themselves to justify the issuance of the preliminary injunction. The Receiver makes no showing of failure of the court to issue the injunction "would subject [the Receiver] to a substantial risk of irreparable harm." Packaging Industries Group, Inc. v. Cheney, supra.

Opposing the Receiver's request for the preliminary injunction, defendants point to the Receiver's failure

to show any risk of irreparable harm. Furthermore, defendants argue that so long as they continue voluntarily to freeze the accounts, the Receiver cannot show a substantial risk of irreparable harm.

As noted above, the movant carries the burden of persuading the court by a clear showing that injunctive relief is warranted. Accordingly, before this Court will grant a preliminary injunction, the Receiver must show that he face a substantial risk of irreparable harm if injunctive relief is not granted. Because the Receiver makes no showing of irreparable harm, injunctive relief is not warranted at this time on this basis alone.9

Assuming arguendo that the Receiver had made a showing of a substantial risk of irreparable harm, this court would still have to balance any such harm to the Receiver against any similar risk of irreparable harm to defendants if the court granted the injunction. Here, this court recognizes the precarious position in which defendants find themselves. Both the Receiver and Monga lay claim to funds in the frozen accounts. The Receiver contends that as a receiver he stands in the shoes of Monga and is, therefore entitled to liquidate the funds in the IRA accounts. On the other hand, it is represented to the court by defendants that Monga insists that the IRA accounts are exempt from attachment by the Receiver. Until the validity of these claims is determined, any action by defendants exposes them to litigation.

Additionally, this court agrees with defendants' argument that so long as the funds in the accounts remain frozen, the Receiver faces no substantial risk of irreparable harm. However, this court also recognizes that because defendants are voluntarily freezing the account, the threat of irreparable harm to the Receiver remains a future possibility.

Any change in the status of the funds that would result in their dissipation would, in the view of this court, raise a colorable and immediate claim concerning irreparable harm to the Receiver. Thus, although this court does not find injunctive relief to be an appropriate remedy at this time, this court reserves the right to review its order if there is any change to the status of the funds.10

The Appropriateness of Contempt as a Remedy

Despite the Vanguard defendants' failure to set forth arguments justifying dismissal under Mass. R. Civ. P. 12(b) this court, nonetheless, is troubled by the appropriateness of a civil contempt proceeding against the Vanguard defendants.

The purpose of this court's contempt jurisdiction is "to enforce orders and to punish acts tending to degrade or obstruct the administration of justice." See John M. Connors, supra, at 164. Massachusetts Rules of Civil Procedure 65.3(a) specifies the situations justifying the invocation of a court's civil contempt power:

"Applicability. Enforcement of compliance with the following court orders shall be sought by means of a separate civil proceeding denominated as a 'civil contempt proceeding': (1) temporary restraining orders, preliminary or permanent injunctions pursuant to Rule 65, or stipulations in lieu thereof; (2) orders issued pursuant to Rule 70; and (3) any other orders or judgments entered pursuant to these rules, for the violation of which civil contempt is an appropriate remedy...." (emphasis added)

In the present case, the orders for which plaintiff alleges defendants are in contempt do not constitute any of the types of orders delineated in Rule 65.3 (a)(1) or (2). Therefore, plaintiffs contempt complaint falls under the "catch-all" provision of Rule 65.3 (a)(3). The language of Rule 65.3(a)(3) requires this court to determine if the violation of the orders here constitutes a "violation [for] which civil contempt is an appropriate remedy...." This is a determination usually made after the court has considered the merits of the contempt complaint. However, given the procedural history of this contempt action and the fact that the Receiver has now brought an action directly against all defendants, including the Vanguard defendants, this court believes that the determination of whether civil contempt is an appropriate remedy should not be postponed.

At this juncture, a contempt proceeding is premature. In light of the fact that defendants were not parties to this case until after the subject orders were issued, that Monga threatened legal action against them if defendants were to comply with the

court's orders by turning over the accounts to the Receiver, and that defendants have appeared before this court with an articulable and reasoned basis for believing that they were not properly subject to said orders, defendants' conduct is not the kind of obstructive, thwarting, disrespectful and generally contumacious behavior which warrants sanction. Therefore, given the discretion afforded by Rule 65.3 (a)(3) and this court's inherent discretion over its contempt powers, this court dismisses plaintiffs' contempt complaint without prejudice to being brought again if further court orders are disobeyed.

ORDER

For the following reasons, it is hereby ORDERED that,

The Receiver's request for a preliminary injunction be DENIED without prejudice to the Receiver's right to renew his request for a preliminary injunction. In issuing this order this court relies on the repeated representations of defense counsel that the funds in the mutual fund accounts of Monga and Core Environmental will remain frozen and will not be dissipated prior to the determination of the validity of the accounts an/or a determination of the Receiver's rights to the funds in the accounts. Furthermore, it is hereby ORDERED that if defendants contemplate any change in the status of the funds, defendant shall immediately notify the Receiver, thus allowing the Receiver to renew his motion for a preliminary injunction and to make the requisite showing of irreparable harm;

Defendants' motions to dismiss Receiver's Complaint to Effect Turnover of Accounts pursuant to Mass. R. Civ. P. 12(b)(1) be DENIED;

Defendants' motions to dismiss Receiver's Substitute Complaint to Effect Turnover of Accounts pursuant to Mass. R. Civ. P. 12(b)(1) be DENIED; and

Receiver's Complaint for Contempt by DISMISSED without prejudice.

"s/Barbara A. Lenk"
Barbara A Lenk, Justice of the Superior Court
Dated: June 1, 1995

1 Of D. Dev Monga and Core Environmental Resources, Inc.

2 Vanguard Morgan Growth Fund. Plaintiff's contempt complaint also name Franklin Administrative Services, Inc., and Franklin Utilities Fund as defendants. On February 28, 1995, however, a partial stipulation of dismissal with prejudice was entered dismissing plaintiff's claims against Franklin Utilities Fund and Franklin Administrative Services, Inc.

3 Prior to the court's orders, defendants had no involvement with this case.

4 In response to the court's order Citadel had actually delivered a check to the Receiver representing the transfer of the funds held in those accounts, but apparently due to Monga's threats Citadel stopped payment on the check.

5 The Receiver also threatened to file contempt proceedings against Founders Funds and Citadel, its transfer agent. Faced with the Receiver's threat, however, Founders Funds state that it and Citadel would turn over the accounts if the court entered an order delineating certain procedures to facilitate the transfer. On December 16, 1994, this court issued the order. To date, it appears that neither Founders Funds nor Citadel have turned over the accounts.

6 This court's contempt power is also rooted in its general equity jurisdiction. Thus, contempt is also an in personam action.

7 Although only the Vanguard defendants challenge the court's jurisdiction to consider the contempt complaint, all defendants challenge the court's jurisdiction to consider the counts in the complaints to effect turnover of accounts. To support their various motions contesting this court's jurisdiction, defendants rely on the argument advanced by the Vanguard defendants in their motion to dismiss the contempt complaint. By reference all defendants incorporate the Vanguard defendant's argument into their motions to dismiss the complaints to effect turn over of accounts. It should also be noted that defendants never clearly identify on what basis or bases they challenge this court's jurisdiction.

Although defendants move to dismiss the Receiver's various complaints, defendants never specify whether they are moving pursuant to Mass. R. Civ. P. 12 (b) (1) or (2). Given that in moving to dismiss the Receiver's complaint to effect turn over of accounts defendants appear to concede that they are not challenging the court's personal jurisdiction and because defendant's motions fail to assert lack of jurisdiction over the person as a defense, it is deemed to be waived. Mass. R. Civ. P. 12 (g). See also James W. Smith and Hiller B. Zobel, Rules Practice, §12.22 at 308 (1974).

Additionally in and order dated December 16, 1994, this court concluded that it had personal and subject matter jurisdiction over defendant Founders Funds, Inc. Any request for reconsideration of that order should comply with Superior Ct. R. 9D.

8 In finding jurisdiction to consider the actions stated in the Receiver's complaints, this court does not reach the apparent choice of law arguments set forth in defendants' motion to dismiss the Receiver's complaint seeking to effect turn over of accounts. Resolution of that issue at this stage of litigation would be premature.

9 Because the Receiver has not met his burden on the issue of irreparable harm, this court need not address whether the Receiver has a likelihood of succeeding on the merits.

10 Given Monga's history of thwarting the orders of this court and his propensity for moving assets before the Receiver can reach them, any change in

the status of the funds would most likely constitute irreparable harm.

APPENDIX O

Court of Common Pleas, Montgomery County, Pennsylvania, No. 95-17717

Dated September 14, 1995

MONGA'S ACTION FOR DECLARATORY JUDGMENT

IN THE COURT OF COMMON PLEAS
MONTGOMERY COUNTY
September 14, 1995

ACTION FOR DECLARATORY JUDGMENT

NO. 95-17717

D. DEV MONGA
24 N. Merion Avenue #132
Bryn Mawr, PA 19010
v.

JOHN C. OTTENBERG, RECEIVER
260 Franklin Street
Boston, MA 02110

-and-

VANGUARD FIDUCIARY TRUST COMPANY
455 Devon Park Drive
Wayne, PA 19087

-and-

INVESTORS FIDUCIARY TRUST COMPANY
127 West 10th Street
Kansas City, Missouri 64105-1716

COMPLAINT FOR DECLARATORY RELIEF

Plaintiff D. Dev Monga, by his undersigned counsel, brings this action seeking a declaration that certain Individual Retirement Accounts he owns are exempt from creditor claims brought by a receiver in Massachusetts and avers as follows:

Plaintiff D. Dev Monga, also known as Dharam D. Monga, ("Monga") is an adult individual residing in Pennsylvania who maintains an address at 24 N. Merion Street, #132, Bryn Mawr, PA 19010. In or about 1991, Paul F. Sommer, Monga's former business partner, allegedly obtained judgment in Massachusetts against Monga, his wife, and several environmental engineering companies totaling approximately $550,000 in a matter captioned Paul F. Sommer v. D. Dev. Monga, et al., No. 89-2951 (Mass., Middlesex Superior Ct.) (the "Sommer judgment").

Defendant John C Ottenberg, Receiver ("Ottenberg") is an attorney in Massachusetts with offices at 260 Franklin Street, Boston, MA 02110. On or about June 15, 1992, Ottenberg was appointed receiver in Massachusetts to enforce the Sommer judgment.

Defendant Vanguard Fiduciary Trust Company ("Vanguard") is a retirement fund custodian with offices at 455 Devon Park Drive, Wayne PA 09807. Vanguard is the custodian of a Vanguard/Morgan Growth Fund mutual fund owned by Monga with a value of approximately $65,000 – Account No. 0026-09876070647. Vanguard is named in this action as a stakeholder only.

Defendant Investors Fiduciary Trust Company ("IFTC") is a retirement fund custodian with offices at 127 West 10th Street, Kansas City, MO 64105. IFTC is the custodian of two Founders Fund mutual fund Individual Retirement Accounts established and beneficially owned by Monga with a value of approximately $24,000 – Account Nos. 375-1000434831 an 372- 1000434832. IFTC is named in this action as a stakeholder only. (The Vanguard and IFTC Individual Retirement Accounts are collectively referred to as "Monga's IRA Accounts.")

The retirement funds in Monga's IRA accounts are exempt from execution or attachment by judgment creditors and may not be seized to satisfy the Sommer judgment. See 42 Pa.C.S. Section 8124 (retirement funds exempt form execution and attachment).

Furthermore, any attempt to reach into Pennsylvania from Massachusetts for the purpose of enforcing the Sommer judgment against Monga's IRA Accounts in that foreign jurisdiction is unlawful. See 42 Pa.C.S. Section 8128 (enforcement of claims against Pennsylvania residents in foreign jurisdictions prohibited).

Although Ottenberg's jurisdiction is limited to Massachusetts and none of Monga's IRA accounts are located in Massachusetts, Ottenberg has unlawfully attempted to enforce the Sommer judgment extraterritorially by demanding that Vanguard and IFTC improperly transfer Monga's

IRA Accounts from Pennsylvania and Missouri to him in Massachusetts.

Vanguard and IFTC have to date refused to comply with Ottenberg's unlawful demands as jurisdictionally improper. Nevertheless, the stakeholders have unilaterally frozen Monga's IRA Accounts and have refused Monga's request to remove the freeze on his retirement funds until a Court with proper jurisdiction over Monga approves the request.

As a Pennsylvania resident, Monga is subject to this Court's jurisdiction and, seeks a declaration that his retirement funds are indeed exempt from execution or attachment by Ottenberg to satisfy the Sommer judgment obtained in Massachusetts.

To obviate any concern that the funds in Monga's IRA Accounts would be dissipated if the freeze was lifted, Monga voluntarily consents to the placement of his IRA Accounts in custodia legis with this Court pending the resolution of this action, thus sparing the stakeholders further expense in defending Ottenberg's unlawful extra-jurisdictional collection efforts in Massachusetts.

WHEREFORE, plaintiff D. Dev Monga respectfully requests the entry of an Order:

Declaring that Monga's IRA Accounts, to be held in custodia legis, are retirement funds exempt from execution or attachment in satisfaction of creditor claims, including the Sommer judgment; and

Granting plaintiff such other and further relief as is just and reasonable.

"s/Edmonds J. Brokans"
Edmonds J. Brokans, Esquire
Attorney I.D. No. 34373
O'BRIEN & RYAN
Suite 300, Hickory Pointe
Plymouth Meeting, PA 19462
Tel. 610-834-6235
Attorney of Plaintiff
D. Dev Monga

APPENDIX P

Court of Common Pleas
Montgomery County, Pennsylvania
No. 95-17717,

Dated September 22, 1995

ORDER
REQUIRING VANGUARD AND IFTC TO PLACE IRAS IN CUSTODIA LEGIS WITH COURT

IN THE COURT OF COMMON PLEAS
MONTGOMERY COUNTY
Dated 9/22/95

D. DEV MONGA ACTION FOR
24 N. Merion Avenue, #132 DECLARATORY
Bryn Mawr, PA 19010 JUDGMENT

v.

JOHN C. OTTENBERG,
RECEIVER
260 Franklin Street
Boston, MA 02110

-and-

VANGUARD FIDUCIARY
TRUST COMPANY
455 Devon Park Drive
Wayne, PA 19087

-and-

INVESTORS FIDUCIARY
TRUST COMPANY
127 West 10th Street
Kansas City, MO 64015

ORDER ACCEPTING
PLAINTIFF'S VOLUNTARY TENDER OF
RETIREMENT FUNDS
IN CUSTODIA LEGIS PENDING FURTHER
ORDER OF COURT

And now, this 22nd day of September, 1995, plaintiff D. Dev Monga, also known as Dharam Dev Monga

("Monga"), having voluntarily tendered control and custody his retirement funds to the Court in custodia legis pending a determination of whether said funds are exempt from execution and attachment in satisfaction of an outstanding judgment in Massachusetts, it is hereby ORDERED and DECREED that, pending further Order of the Court:

The following Individual Retirement Account established and beneficially owned by Monga are hereby placed in custodia legis with the Court:
Account No. 0026-09876070647 registered with Vanguard Fiduciary Trust Company ("Vanguard") as custodian for the benefit of Dharam Dev Monga;

Account Nos. 375-1000434831 and 375-1000434832 registered with Investors Fiduciary Trust Co. ("IFTC") as custodian for the benefit of Dharam Dev Monga.
Vanguard and IFTC shall forthwith deliver certificates representing Monga's ownership interest in the above accounts to the Prothonotary of the Court:

Vanguard and IFTC are hereby discharged from any and all liability resulting from their compliance with this Order, and upon deliver of certificates to the Prothonotary, are excused from further attendance in this case;

The claim by Defendant John C. Ottenberg, Receiver ("Ottenberg"), that Monga's retirement funds are subject to execution in satisfaction of the Massachusetts judgment is specifically preserved

through the depositing of the above accounts in custodia legis and will be addressed as part of plaintiff's declaratory judgment action.

BY THE COURT:

"s/Paul W. Tressler, Judge"
Paul W. Tressler, Judge

CERTIFIED FROM THE RECORDS OF THE PROTHONOTARY COURT OF COMMON PLEAS, MONTGOMERY COUNTY, PA
Dated 9/22/95
WILLIAM E. DONNELLY, PROTHONOTARY

APPENDIX Q

Massachusetts Superior Court
CA. No. 89-2951

Dated October 13, 1995

EX PARTE TEMPORARY INJUNCTION

COMMONWEALTH OF MASSACHUSETTS
COUNTY OF MIDDLESEX
(SEAL) THE SUPERIOR COURT
Civil Docket # MICV89-02951

October 13, 1995

Sommer, Plaintiff(s)
vs.
Dev Monga et al, Defendant(s)

TEMPORARY INJUNCTION

TO: Agents, Attorneys and Counsellors, and each and every of them, GREETING:

WHEREAS, it has been represented unto us in our SUPERIOR COURT, by Paul F. Sommer, plaintiff(s), that he, said plaintiff(s), D Dev Monga, Core Environmental Engineering, Subsurface Technologies, Inc, Vanguard Fiduciary Trust, Vanguard/Morgan Growth Fund, Inc, Franklin/Templeton Invcs Ser Inc, Franklin Utilities Fund, Franklin Custodian Funds, Inc, Founders Funds, Inc, Citadel Service Co Inc, Investors Fiduciary Trust Co wherein said plaintiff(s), among other things, pray for a Writ of Injunction against you, to restrain you and the persons named from doing certain acts and things in said complaint set forth, and hereinafter particularly specified and mentioned.

We, therefore, in consideration of the premises, do strictly enjoin and command you, the said defendant(s) D. Dev Monga, including Edmund J. Brokans, Esquire, of Suite 300 Hickory Pointe, Plymouth Meeting, Pennsylvania, to desist and refrain from taking any further action to prosecute a legal proceeding in the Count of Common Pleas in Montgomery County in the Commonwealth of Pennsylvania, being Case No. 95-17717 and that they be restrained and enjoined from bringing any similar proceedings in any other courts and further order that D. Dev Monga and his agents and attorneys, including Edmond J. Brokans, Esq. be ordered and directed to forthwith dismiss said case in the Commonwealth of Pennsylvania , until further order of our Court, or some Justice thereof.

Witness, Robert A Mulligan, at Cambridge, this 13th day of October, in the year of our Lord, 1995.

Edward, J Sullivan,
Clerk

APPENDIX R

Massachusetts Superior Court
CA. No. 89-2951,

September 29, 1995

TEMPORARY INJUNCTION

COMMONWEALTH OF MASSACHUSETTS
COUNTY OF MIDDLESEX
(SEAL) THE SUPERIOR COURT
Civil Docket # MICV89-02951

September 29, 1995

Sommer, Plaintiff(s)
vs.
Dev Monga et al, Defendant(s)

TEMPORARY INJUNCTION

TO: Agents, Attorneys and Counsellors, and each and every of them, GREETING:

WHEREAS, it has been represented unto us in our SUPERIOR COURT, by Paul F. Sommer, plaintiff(s), that he, said plaintiff(s), has filed a compliant in our said Court against you, the said defendant(s) D. Dev Monga, Core Environmental & Engineering, Subsurface Technologies, Inc, Vanguard Fiduciary Trust, Vanguard/Morgan Growth Fund, Inc, Franklin Templeton Inves Ser Inc, Franklin Utilities Fund, Franklin Custodian Funds, Inc, Founders Funds, Inc, Citadel Service Co Inc. Investors Fiduciary Trust Co wherein said plaintiff(s), among other things, pray for a Writ of Injunction against you, to restrain you and the persons before named from doing certain acts and things in said complaint set forth, and hereinafter particularly specified and mentioned.

We, therefore, in consideration of the premises, do strictly enjoin and command you, the said defendant(s), Vanguard Fiduciary Trust Company, Vanguard/Morgan Growth Fund, Inc, Franklin Utilities Fund, Franklin Custodian Funds, Inc, Franklin Templeton Investor Service Inc, Founders Funds, Inc, Citadel Service Co Inc, and Investors Fiduciary Trust Company and all and every the persons before named, to desist and refrain from transferring, releasing, paying or distributing to anyone, any shares or funds in any account standing in the name of Dharam D. Monga, IRA or Core Environmental Resources, Inc, Profit Sharing Plan, until the further order of our Court, or some Justice thereof.

Witness, Robert A Mulligan, at Cambridge, this 29th day of September, in the year of our Lord 1995.

Edward J. Sullivan,
Clerk

APPENDIX S

Massachusetts Superior Court
CA. No. 89-2951
Dated September 28, 1995

RECEIVER'S EX PARTE MOTION FOR ENTRY OF PRELIMINARY INJUNCTION

COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX, SS. SUPERIOR COURT
DEPARTMENT OF THE TRIAL COURT
CIVIL ACTION NO. 89-2951

September 28, 1995

PAUL F. SOMMER, Plaintiff v. D. DEV MONGA, ET. AL, Defendants

RENEWED EX PARTE MOTION FOR PRELIMINARY INJUNCTION

Now comes John C. Ottenberg, Receiver of D. Dev Monga and Core Environmental Resources, Inc., and moves that this Court enter a Preliminary Injunction in accordance with prayer 2 of the Receiver's Substitute Complaint to Effect Turnover of Accounts. In support hereof, the Receiver says that Mr. Monga has initiated a case in the Courts of the State of Pennsylvania, in violation of prior orders of this Court, and that the Vanguard defendants have state an intention to turn over control of the assets in question to the Court in Pennsylvania. Therefore, there exists the threat of irreparable harm, and the Receiver asks that this Court enjoin the Vanguard defendants from doing so.

Respectfully Submitted,

"s/John C. Ottenberg"
John C. Ottenberg, Receiver
Berry, Ottenberg, Dunkless, & Parker

260 Franklin Street
Boston, MA 02110
(617) 261-6566
BBO# 380955
Dated: September 28, 1995

September 28,1995
Filed in Court

Attest
Leona M. Kusmarik
Assistant Clerk

The following handwritten endorsement of Judge Neel follows on the side and the bottom of this document:

9/28/95: After hearing, at which counsel for Vanguard and the Receiver were present, an upon the representation of Vanguard's counsel that Vanguard will not give up the certificates at issue sooner that 24 hours following receipt of the Pennsylvania action and order, and the further representation that as of the close of business 9/27/95 Vanguard had not received such service, and that Vanguard will inform the Court when service is made, no action is taken on this motion.

9/29/95 For the following reasons, the motion is allowed. NB 1) this court, on July 6, 1992, and August 20, 1992, ordered defendants to turnover the mutual fund accounts, which they failed to do; 2) the

defendants, having previously frozen the accounts and thereby forestalled an injunction by this court (see order of 6/5/95) now, propose to comply with an order of the Pennsylvania Court of Common Pleas entered September 22, 1995 more than three years after this court's orders; 3) the Pennsylvania courts order is pursuant to a complaint by Monga that Monga is a Pennsylvania resident, a representation this Court finds not credible in view of Monga's own notices filed as recently as June 1995 in this Court listing his address as Suite 679, Box 917729, Longwood FL 32791, and in view of Monga's adjudicated contempt for this courts orders and the capias outstanding for his arrest (see order 6/15/92)

APPENDIX T

Massachusetts Superior Court
CA No. 89-2951

Dated December 1, 1994

AFFIDAVIT OF SUZANNE F. BARTON

COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX SS,
SUPERIOR COURT, DEPARTMENT OF THE
TRIAL COURT, CIVIL ACTION NO. 89-2951
December 1, 1994

PAUL F. SOMMER,
v.
D. DEV MONGA, ET AL
Defendants

JOHN C. OTTENBERG, Receiver of D. Dev Monga
and Core Environmental Resources, Inc.,
Contempt Plaintiffs
v.
VANGUARD FIDUCARIARY TRUST CO, Et al.
Contempt Defendants

AFFIDAVIT OF SUZANNE F. BARTON

I am Assistant Vice President and Associate Counsel to the Vanguard Group; Inc., the parent company of Vanguard Fiduciary Trust Company ("VFTC") and service subsidiary of Vanguard/Morgan Growth Fund Inc., (the "Vanguard Fund"), the contempt defendants in this action. (VFTC and the Vanguard Fund are collectively referred to as "Vanguard".) I am a member in good standing of the Bar of the

Commonwealth of Pennsylvania. The facts set forth herein are based upon my personal knowledge and my review of the Vanguard files related to this matter. I submit this Affidavit in support of Vanguard and Franklin's Motion to Dismiss the Contempt Complaint.

The Vanguard Group, Inc. is a Pennsylvania corporation which provides transfer agency services for the Vanguard Fund. Vanguard Fiduciary Trust is a limited purpose trust company that provides custodial services to certain retirement arrangements whose assets are invested in the Vanguard Fund. The Vanguard Fund is an open-ended management investment company (mutual fund) located in Pennsylvania and incorporated in Maryland. Vanguard has no offices located within the Commonwealth of Massachusetts.

Vanguard currently maintains an account registered in the name of "VFTC, Custodian, John C. Ottenberg, Receiver, IRA A/C Dharam D. Monga." This account currently hold 4,350.570 shares of the Fund, valued as of $50,292.59 at November 30, 1994. These shares are uncertificated and are maintained as an entry on the records of the Vanguard Fund located in Pennsylvania.

On June 19, 1992, I received a copy of an order appointing John C Ottenberg as receiver of D. Dev Monga and Core Environmental Resources, Inc. The receiver requested that Vanguard freeze Monga's account and "forward the funds" to the receiver.

On June 24, 1992, Vanguard froze the account. The shares in the account have been, and continue to be, fully participating in the Fund's investment experience. However, the freeze has prevented Dharam D. Monga from redeeming, transferring or otherwise depleting the shares held in the account.

On July 9, 1992, I received a copy of an order dated July 7, 1992 directing that "All funds of the defendants...including the account with Vanguard Fiduciary Trust Co. shall be transferred to the receiver."

On or about June, 1992, I received the first of several communications from Mr. Monga. Mr. Monga stated that Order for Appointment of Receiver was the subject of an appeal. Mr. Monga contends that the Massachusetts order appointing Mr. Ottenberg as Receiver is not recognizable in Pennsylvania and has urged that Vanguard not turn over his shares unless ordered to do so by a Pennsylvania court with appropriate jurisdiction. Mr. Monga has repeatedly threatened to take legal action against Vanguard should they turn over control of these funds to the receiver.

In my four years as counsel to Vanguard, I have been involved in several disputes in which parties have attempted to attach or otherwise assert control over a shareholder's shares in various mutual funds managed by the Vanguard Group Inc., including the Vanguard Fund. In each case, the party asserting control of the shares has "domesticated" its claim by obtaining appropriate judgment in an out of state

court, and then requesting that the court of Pennsylvania execute on that out of state judgment pursuant to 42 Pa. C.S.A. § 4306 et. seq. No party has ever asserted that Vanguard must turn over control over mutual fund shares based on an out of state court order.

Since October 1992, other counsel for Vanguard and I have repeatedly encouraged the receiver to domesticate his Massachusetts' judgment by bringing it to the Pennsylvania courts for enforcement. However, we have seen a copy of a final judgment against Monga issued by either the courts of Massachusetts or the courts of Pennsylvania.

Signed under pains and penalties of perjury this 1st day of December, 1994.

"s/Suzanne F. Barton"
Suzanne F. Barton
(Notary stamp)

APPENDIX U

The Vanguard Group of Investment Companies

Dated June 30, 1994

LETTER TO RECEIVER, JOHN C. OTTENBERG

The Vanguard Group of Investment Companies
Valley Forge, Pennsylvania 19482 (215) 669-1000

June 30, 1994

John C. Ottenberg, Esq.
Miller, Ottenberg, Dunkless & Grunebaum
260 Franklin St., Suite 610
Boston, MA 02110

Re : Sommer v. Monga, et. al.

Dear Mr. Ottenberg:

I am writing in response to your recent correspondence with Suzanne F. Barton. Ms. Barton is on maternity leave and I will be handling this matter in her absence. In reviewing our file I have not come across anything that would cause us to change the position that was set forth in Ms. Barton's correspondence to you of October 5, 1992. Namely, that jurisdiction as to the question of whether Mr. Monga's IRA assets are attachable lies with Pennsylvania courts. Accordingly we must decline your request to transfer assets to you. We can only take such action if we are ordered to do so by a Pennsylvania court.

Sincerely,
"s/Paul F. Gallagher"
Paul F. Gallagher
Assistant General Counsel
cc: Thomas D. Rees, Esq.

APPENDIX V

The Vanguard Group

Dated October 5, 1992

LETTER TO RECEIVER, JOHN C. OTTENBERG

The Vanguard Group
Valley Forge, Pennsylvania 19462
(215) 669-1000

October 5, 1992

VIA FEDERAL EXPRESS

John C. Ottenberg, Esquire
Miller, Ottenberg & Dunkless
Suite 1610
260 Franklin Street
Boston, Massachusetts 02110

RE: IRA of Dharam D. Monga
Vanguard/Morgan Growth Fund – Account No. 9876070674

Dear Mr. Ottenberg:

Please be advised that upon further consideration of the Monga situation, we have determined that it will be necessary for you to obtain an order from a Pennsylvania court of appropriate jurisdiction before we comply with your request to transfer the Monga IRA to Fleet Bank.

I have enclosed a copy of the Vanguard Individual Retirement Custodial Account Agreement (the "Agreement"), pursuant to which Vanguard Fiduciary Trust Company serves as Custodian of the Monga IRA. Article 8.4 of the Agreement provides

that the Monga IRA shall be governed by Pennsylvania law. As you may be aware, Pennsylvania law generally prohibits attachment of IRA assets.

Should you have any questions concerning Vanguard's position in this matter, please feel free to contact me directly.

Very truly yours,

"s/Suzanne F. Barton"
Suzanne F. Barton
Associate Counsel

cc: R.J. Kaplinsky, Esq.
T. D. Rees, Esq.

APPENDIX W

The Vanguard Group of Investment Companies
Letter to Monga's Pennsylvania
Counsel Attorney Thomas D. Rees, Esq.

Dated October 1, 1992

The Vanguard Group of Investment Companies
Valley Forge, Pennsylvania 19482 (215) 669-1000

October 1, 1992

Thomas D. Rees, Esquire
High, Swartz, Roberts and Seidel
40 East Airy Street
Norristown, Pennsylvania 19404

RE: IRA of Dharam D. Monga- Acct No. 9876070674

Dear Mr. Rees:

As promised, I have reviewed the Monga situation with Raymond J. Klapinsky, Vanguard's General Counsel. Under the circumstances, Mr. Klapinsky has determined that Vanguard will not transfer Mr. Monga's IRA to Fleet Bank in Massachusetts without an order from a Pennsylvania court of proper jurisdiction.

Incidentally, Vanguard has heard nothing further from Mr. Monga's receiver since you and I last spoke.

Should you have further questions concerning Vanguard's position in this matter, please feel free to contact me directly at 669-8717.

Very truly yours,
"s/Suzanne F. Barton"
Suzanne F. Barton, Associate Counsel
cc: R. J. Klapinsky

APPENDIX X

Massachusetts Superior Court
CA. No. 89-2951

Dated July 13, 1992

AFFIDAVIT OF JACK A. CRICHTON

COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX. SS. SUPERIOR COURT
DEPARTMENT OF THE TRIAL COURT
CIVIL ACTION NO. 89-2951

Dated July 13, 1992

PAUL F. SOMMER,
Plaintiff and Defendant in Counterclaim
v.

CORE ENVIRONMENTAL & ENGINEERNING
RESOURCES, INC. ET AL,
Defendants and Plaintiff in Counterclaim

v.

SOMMER ENVIRONMENTAL
TECHNOLOGIES, INC.
Defendant in Counterclaim

AFFIDAVIT OF JACK CRICHTON

Jack Crichton states under oath as follows:

Without waiving any rights, I submit this affidavit in connection with the Motion for Relief from the Court's Order dated June 12, 1992, appointing a

Receiver for EnviroTech Management, Inc. ("EnviroTech").

I graduated in 1937 with a Bachelor of Science in Petroleum Engineering an a Minor in Geology from Texas A&M University, and a Masters of Science in Petroleum Engineering in 1938 from Massachusetts Institute of Technology, and was awarded the Professional Degree of Petroleum Engineer From Texas A&M in 1953.

I am a Registered Professional Engineer in the states of Texas, Louisiana, and California.

I have been engaged in consulting and management in the petroleum/engineering/geology fields for over fifty years. I am a Past National President of the Society of Petroleum Evaluation Engineers, am a long time member of the American Association of Petroleum Geologists, and am a Legion of Honor Member of the Society of Petroleum Engineers.

I own one hundred percent of a consulting and management company, Crichton & Co. of Dallas, Texas. I am also the Chairman of Arabian Shield Development Company, a publicly traded company engaged in mining and petroleum. In addition, I am involved as an investor in other related businesses in the petroleum, gas, and environmental industries.

In the early part of 1991 I considered opening an environmental consulting company. Because I was familiar with Dev Monga's outstanding professional reputation as an environmental specialist, I

conferred with him on opening such a company in Texas. After conferring with him, it was decided that the most advantageous course would be to open such a company first in the Northeast, and later in Texas.

Since I am engaged in managing my other businesses, I wanted Mr. Monga to manage the company in Massachusetts.

On or about August 21, 1991, and at my instigation, a company was organized in Massachusetts know as EnviroTech Management. The filing fee was paid by me. In August, 1991, I invested $4000.00 in EnviroTech.

The records will show that I am the President, the sole shareholder, and sole Director of EnviroTech, Treasurer and Clerk of EnviroTech.

Because of Mr. Monga's expertise in the environmental field, and his capable management of EnviroTech, I have plans to expand EnviroTech to Texas in the near future. I recently supplied Mr. Monga with extensive information on the environmental consulting industry in Texas.

I understand that on Tuesday, June 16, 1992, the plaintiff Paul F. Sommer and his attorneys appeared at EnviroTech's office unannounced, and in Mr. Monga's absence, illegally searched and seized proprietary client information, files, financial records, and computer date of my company.

I recently learned that subsequently, the plaintiff, who is a competitor of EnviroTech, sought and obtained the appointment of a Receiver for the company.

Although EnviroTech has an Agent for Service of Process in Massachusetts, Anthony M. Neal, Esquire, to the best of my knowledge no process was ever served upon Mr. Neal in connection with the illegal search and seizure of my company, or in connection with the appointment of a Receiver for EnviroTech.

It was a shock to me to learn that a Receiver had been appointed for EnviroTech, on the basis that this company was the alter ego of a previous company managed by Mr. Monga.

Although I have not participated in the day to day operations of EnviroTech, I have been kept apprised of its progress by Mr. Monga (its manager), its clients, its work, its employees and plans.

It appears that Mr. Sommer is attempting to put EnviroTech out of business, and as an investor in the company, if such happens, I will suffer material and irreparable damages.

I am unfamiliar with Massachusetts law, but am certain there are legal resources to me in Massachusetts for such damages, which I intend vigorously to pursue.

I certify that the foregoing statements are true and correct to the best of my knowledge and belief.

Dated: July 13, 1992

"s/Jack A. Crichton"
Jack A. Crichton

APPENDIXY

Massachusetts Superior Court,
CA. No. 89-2951

August 20, 1992

RECEIVER'S REQUEST FOR INSTRUCTIONS REGARDING VANGUARD MORGAN GROWTH FUND ACCOUNT

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX. SS.
SUPERIOR COURT
DEPARTMENT OF THE TRIAL COURT
CIVIL ACTION NO. 89-2951

August 20, 1992
PAUL F. SOMMER,
Plaintiff
v.
D. DEV MONGA, ET AL.
Defendants

RECEIVER'S REQUEST FOR INSTRUCTIONS REGARDING VANGUARD MONGAN GROWTH FUND ACCOUNT

Now comes John C. Ottenberg, receiver of Dharam Dev Monga, states that he has been informed of an account at the Vanguard Morgan Growth Fund, designated as an IRA account consisting of approximately $43,600. The receiver says that given the history of this matter in that assets have been secreted from creditors and the receiver by this defendant, that it would be appropriate to have these funds turned over to the receiver and maintained in a segregated IRA account, until such time as it is determined whether these funs are in actuality IRA funds, and whether they are subject to the claims of creditors.

WHEREFORE, John C. Ottenberg, receiver, prays that this Court issue an order in accordance with the former Proposed Order annexed hereto.

Respectfully submitted,

"s/John C. Ottenberg"
John C. Ottenberg,
Receiver
Miller, Ottenberg, & Dunkless
260 Franklin Street
Boston, MA 02110
(617) 261-6566
BBO:# 380955

(hand written)

APPENDIX Z

Massachusetts Superior Court
CA No. 89-2951

August 20, 1992

ORDER REGARDING VANGUARD MORGAN GROWTH FUND ACCOUNT

COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX. SS.
SUPERIOR COURT
DEPARTMENT OF THE TRIAL COURT
CIVIL ACTION NO. 89-2951
August 20, 1992
PAUL F. SOMMER, , Plaintiff
v.
D. DEV MONGA, ET AL., Defendants
ORDER

John C. Ottenberg having been appointed receiver of Dharam D. Monga in this matter, and this matter having come before the Court on the Request for Instructions Regarding the Vanguard Morgan Growth Fund Account, it is hereby Ordered, Adjudged , and Decreed as follows:

The Vanguard Morgan Growth Fund is ordered to turn over to the receiver all of the funds in account no. 987607647, standing in the name of Dharam D. Monga, IRA.

The receiver is ordered to maintain said funds in an account designated as an IRA account, and thereafter entitlement to these funds shall be determined in later proceedings.

By the court,
"s/Doerfer, J"

Dated: August 20, 1992 Attest. Leona M. Kusmarik
Assistant Clerk

APPENDIX AA

Massachusetts Superior Court
CA. No. 89-2951

August 20, 1992

ORDER
REGARDING FOUNDERS

COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX. SS.
SUPERIOR COURT
DEPARTMENT OF THE TRIAL COURT
CIVIL ACTION NO. 89-2951
August 20, 1992
PAUL F. SOMMER,
Plaintiff ORDER
v.
D. DEV MONGA, ET AL.
Defendants

John C. Ottenberg having been appointed receiver of Dharam Dev Monga in this matter, and this matter having come before the Court on the Request for Instructions Regarding Founders Fund Accounts, it is hereby Ordered, Adjudged, and Decreed as follows:

1. The Citadel Service Co., Inc., transfer agent for Founders Funds is ordered to turn over to the receiver all of the funds held by it and the Founders Funds, standing in the name of Dharam Dev Monga, IRA.

2. The receiver is ordered to maintain said funds in an account, designated as an IRA account, and thereafter entitlement to these funds shall be determined in later proceedings in this case.

By the court,

"s/Doerfer, J"
Doerfer, J.

Dated: August 20, 1992

Attest " s/Leona M. Kusmirek"
Leona M. Kusmirek
Assistant Clerk

APPENDIX BB

Massachusetts Superior Court
CA. No. 89-2951,

Dated June 15, 1992

ORDER APPOINTING RECEIVER

COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX. SS.
SUPERIOR COURT
DEPARTMENT OF THE TRIAL COURT
CIVIL ACTION NO. 89-2951

June 15, 1992
PAUL F. SOMMER,
Plaintiff
v.
D. DEV MONGA, ET AL
Defendants

ORDER FOR APPOINTMENT OF RECEIVER

This action was heard upon the return of an order to show cause why a receiver should not be appointed to take possession of the property of the defendants, D. Dev Monga ("Monga"), Core Environmental Resources, Inc. (formerly Core environmental & Engineering Resources, Inc.) ("Core"), and Subsurface Technologies, Inc. ("Subsurface") (collectively, the "Defendants") and of Monga's wife, Shantee Maharaj Monga ("Maharaj"). After hearing, the Court finds as follows:

1) Sommer has obtained judgments in this Court totalling, with pre-judgment interest, approximately $550,000.00 against Core, Subsurface and Monga;

2) Core, Subsurface and Monga have assets that are applicable to payment of Sommer's judgment, but Monga has mingled the assets of Core and Subsurface with his own and those of his wife, Maharaj, and has concealed the assets of all four;

3) present circumstances are such that to deny this motion would lead to the wasting and loss of such property owned by Monga, Core and Subsurface;

4) Sommer's judgments against Monga cannot be satisfied because Monga has fraudulently conveyed his real and personal property to one or more third parties; and

5) Sommer has no adequate remedy at law to preserve the property subject to his judgments.

It is therefore, ORDERED AND ADJUDGED that, until further order of the Court:

1. John Ottenberg, Esquire, 260 Franklin Street, Boston, MA 02110 be and hereby is appointed receiver of the estate, property, money, debts, and effects of every kind and nature of or belonging to the defendants and to Maharaj and he is hereby authorized and directed to collect, get in, and take charge of all the singular thereof, and to hold the same subject to the further order of the Court.

2. That the defendants, and Maharaj, their officers, servants, agents and attorneys and each of them, are hereby required and ordered to deliver to said

receiver all the property, monies, stock in trade and effects of every kind and nature, belonging to the defendants in their hands, possession, or control, together with all books, deeds, documents, vouchers, and papers relating thereto, and the defendants and Maharaj, and their officers, servants, agents and attorneys, and each of them, are hereby restrained and enjoined from collecting any of the debts or accounts due to the defendants, and from using, spending, injuring, conveying, transferring, selling, or in any manner disposing of or encumbering any of the effects or property aforesaid, except to deliver them into the hands of said receiver.

3. That the receiver is hereby ordered to collect all sums due the defendants, for the benefit of the parties entitled thereto and to conserve and manage the assets of the defendants, and all of Core's and Subsurface's subsidiaries and to operate the defendants' respective businesses and to provide to the Court an accounting as required by Rule 66 of the Massachusetts Rules of Civil Procedure and the applicable provisions of the Massachusetts General Laws including, without limitation, Chapter 155 and Chapter 156B.

4. That the said receiver is required to file in the office of the clerk of this Court, within thirty days after the date of entry of this Order, under oath, a detailed inventory of the property of which he has possession, or the right of possession, with the estimated values thereof, together with a list of encumbrances thereon; and also a list of the creditors

of the receivership and of the defendants and Maharaj so far as known to them.

5. That the receiver shall deposit all money received by him in some national bank, trust company, co-operative bank or savings bank in his name as receiver, but no disbursements of these funds shall be made by the receiver without further order of the Court.

6. That all persons claiming to be creditors of the defendants or Maharaj, or any of their successors, assigns or subsidiaries, are hereby enjoined from instituting any suits, from further prosecuting any suits heretofore instituted, or exercising any power of foreclosure against any of the defendants or Maharaj without special permission from this Court.

7. That the defendants and Maharaj, their officers, servants, agents and attorneys, and the receiver, shall make available for inspection and review by Sommer and/or his agents all of the defendants' and Maharaj's books and records.

8. That any of the parties or Maharaj, or the said receiver, may apply to the Court from time to time for such further directions, or orders, as many as may be necessary.

9. The fact that this Order is issued pursuant to Sommer's prayer shall not be deemed to alter the pre-existing legal relationship between Sommer and the defendants or to dissolve any attachments or injunctions entered or to be entered by this Court or

by the Court presiding in Sommer v. Monga, et als., Middlesex Superior court Civil Action No. 91-7415 against any of the defendants in this case.

10. The receiver shall also be entitled to collect all mail of any of the defendants and Maharaj in Marblehead, Salem and Peabody, Massachusetts, or in any other location in which any of the defendants or Maharaj maintain postal service.

11. The receiver, his agents, and attorneys shall not be personally liable for any actions or inaction arising out of the discharge or performance of the receiver's duties and powers. Any judgment recovered against the receiver, as such, or against the defendants or Maharaj shall be payable only from the defendants' funds.

12. The receiver may apply to the Court for instructions, and the Court reserves the right to make and enter such further orders, upon appropriate application, as may be necessary or desirable for the administration of the estates.

13. Receiver is to post a bond in the sum of $5,000:

SO ORDERED,

"s/ Katherine Liacos Izzo"
Katherine Liacos Izzo
Associate Justice

Dated: June 15, 1992

APPENDIX CC

Massachusetts Superior Court
CA. No. 89-2951

June 10, 1992

AFFIDAVIT OF CATHY P. BROOKS

COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX, SS. SUPERIOR COURT
DEPARTMENT OF THE TRIAL COURT
CIVIL ACTION NO. 89-2951

June 10, 1992

PAUL F. SOMMER, Plaintiff
v.
D. DEV MONGA, ET AL Defendants

AFFIDAVIT OF CATHY P. BROOKS

Cathy P. Brooks states under oath as follows:

I am a member of the bar of the Commonwealth of Massachusetts and one of the lawyers representing the plaintiff in this action, Paul F. Sommer ("Sommer"). I make the following statements of my personal knowledge or, if I state facts on information and belief, I believe them to be true.

Sommer commenced this lawsuit in May 1989. The trial began on May 28, 1991 and, on June 7, 1991, a Middlesex County Superior Court jury returned verdicts for Sommer and against the defendants, D. Dev Monga ("Monga") and Monga's two companies, Core Environmental and Engineering Resources, Inc. ("Core") and Subsurface Technologies, Inc. ("Subsurface"). The verdicts total approximately $550,000.00 with pre-judgment interest and the defendants' liability will equal or exceed

approximately $700,000.00 after all appeals have been exhausted.

On June 12, 1991 this court issued a permanent injunction restraining and enjoining the defendants from "selling, assigning, transferring, encumbering or otherwise disposing of their real or personal property, other than in the ordinary and usual cause of business, until the judgment in this matter has been satisfied or has been vacated."

Fraudulent Conveyance of Real Estate

On information and belief, Monga conveyed and encumbered his residential real estate during the pendency of this litigation and during the pendency of a motion for real estate attachment in this litigation. Specifically, on or about August 21, 1990, more than a year after this lawsuit was commenced, Monga conveyed to himself and Shantee Maharaj ("Maharaj") husband and wife as tenants by the entirety, the property at 36 Wharf Path, Marblehead, Massachusetts (Monga's residence) for "nominal" consideration (the "Property"). A copy of that deed attached to my affidavit of January 17, 1992 ("Jan. Aff.") as Exhibit 1.

On information and belief, also on or about August 21, 1990. Monga and Maharaj applied for a residential mortgage loan on the Property. (Jan. Aff. Ex. 2). In the application, which Monga and Maharaj signed while this case was pending, under the acknowledgement that "I/we fully understand that it is a federal crime punishable by fine or

imprisonment, or both, to knowingly make any false statements concerning any of the above facts..." and representing in writing that "all statements made in this application are true", Monga denied (1) that he was a party to a law suit, an (2) that was a co-maker or endorser on a note.

On information and belief, on or about August 31, 1990, the loan in the amount of $51,750.00 closed, with the Property mortgaged as security. A check for the proceeds of $45,887.43 was made payable to Monga and Maharaj and deposited by them into a joint account at Shawmut Bank, N.A. ("Shawmut") on or about September 26, 1990. On or about September 27, 1990, Monga drew a check in the amount of $22,850.00 from Core's regular business checking account (not from the payroll account) and deposited those funds into that same joint personal account. On or about September 29, 1990, Monga withdrew $85,000.00 in cash from the joint account and transferred those funds to a presently unknown repository.1 Copies of two checks and the withdrawal slip are attached hereto as Exhibits 1, 2, and 3 respectively.

Maharaj filed a declaration of homestead pertaining to the Property on September 10, 1990 (Jan. Aff. Ex. 3) an filed a confirmatory declaration of homestead with regard to the same property on October 31, 1990.

On October 31, 1990, Monga and Maharaj granted a further mortgage on the Property to a relative, Gita Beharry, to secure payment of $100,000.00 with

interest, as provided in a note of the same date. (Jan. Aff. Ex. 4). In his deposition in this case on January 31, 1992 Monga stated under oath that he received no money from Ms. Beharry and claimed not to know whether or not Maharaj had received any.

Transfer of Operating Accounts and Escrowed Funds

Subsurface had maintained its main operating account at Century North Shore Bank ("Century") since February 1988 and Core had maintained its main operating account at Shawmut since January 6, 1989. On June 12, 1991, Sommer made a motion for attachment by trustee process of all accounts held in the names of any of the defendants at Century and Shawmut. The attachments were approved at a hearing in open court on that same day. Trustee summonses for each of the three defendants were then issued and were served on Century and Shawmut on June 13, 1991. Copies of the summonses with return of service are attached as Exhibits 2-7 to my affidavit of August 13, 1991. ("Aug. Aff.")

On June 25, 1991 and on July 8, 1991, Shawmut answered that as of the date of service upon it, (June 13, 1991), it held no funds in the names of Monga or Subsurface and only $66.00 in an account in Core's name. Core's operating account had been emptied the day before service, on June 12, 1991. (Aug. Aff. Ex. 8-10).

On June 26, 1991, Century answered that as of the date of service upon it, (June 13, 1991), it held not

fund in Monga's name nor in Subsurface's operating accounts. Century did hold funds in one account for the defendant Core and one account in the name of Subsurface. (Aug. Aff. Ex. 11-13). The Core account had funds in the amount of $18,340.90 and the Subsurface account held funds in the amount of $7,266.31. These two accounts appeared to be the "escrow" accounts that Monga claimed he had established in Sommer's behalf in March of 1989. (See paragraphs 12 and 13 below.)

As part of their defense to Sommer's claims, the defendants had claimed that they had tendered funds to Sommer in March 1989, partially satisfying their obligations to Sommer under the stock repurchase agreements at issue in the case. Throughout the pendency of this action, the defendants have repeatedly represented to Sommer and to this Court that the funds that they claimed Subsurface and Core had tendered to Sommer in March 1989 had been placed, and were maintained, in special escrow accounts at Century Bank (the "Escrowed Funds"). In their Answer and Verified Counterclaim (filed on June 29, 1989), the defendants identified those accounts as #4114043 (Core) and #4114061 (Subsurface) at Century. Furthermore, on April 3, 1990, the defendants entered into a Stipulation of the Parties Concerning Funds Previously Transferred to Plaintiff [in March 1989]" (the "Stipulation") (Jan. Aff. Ex. 5). In that Stipulation, the defendants represented that the Escrowed Funds were then being held as two certificates of deposit at Century Bank and those funds "will not be alienated, assigned, dissipated or in any way encumbered or spent during the duration

of the lawsuit, and will be held in escrow by the defendants until this action has been resolved".

However, when, on or about July 22, 1991, Century responded to Sommer's interrogatories, I learned that these accounts no longer existed. Century's records reveal that these accounts were closed on July 13, 1989. Copies of the July statements for the escrow accounts are attached hereto as Exhibits 4 and 5. The Century accounts containing the $18,340.00 (Core) an $7,266.31 (Subsurface) that had appeared to represent the allegedly Escrowed Funds had not been opened until June 12, 1991, the day this Court issued the summonses to Century Bank in open court with Monga's counsel present. Copies of the monthly statements for these two accounts are attached as Exhibits 14 and 15 to my affidavit of August 13, 1991. Thus, directly contrary to their express representations to this court, the defendants had closed the accounts containing the Escrowed Funds and had conveyed those funds elsewhere.

Not only did Monga close the accounts holding the original Escrowed Funds, Monga also attempted to encumber any and all funds held by Century in Core's and Subsurface's names. Contrary to the Stipulation, Monga, on behalf of Core, pledged all of Core's funds on deposit at Century to secure a loan in excess of $19,900.00. Sommer does not presently know where the loan proceeds went or are. A copy of the Security Agreement pledging those funds is attached to my January Affidavit as Exhibit 6.

Even more importantly, on May 6, 1991, on the eve of trial in this case and more than a year after filing the

Stipulation that he would not alienate the Escrowed Funds, Monga pledged all of Subsurface's funds on deposit with Center as security for a loan in excess of $63,800.00. Again, the whereabouts of those loan proceeds are also unknown. (Jan. Aff. Ex. 7). Century Bank presently takes the position that Century, not Sommer, is entitled to the "escrow" funds found there on June 13, 1991.

Thus, Monga clearly violated his agreement with this Court by (1) closing the accounts containing the Escrowed Funds and transferring those funds to an unknown location, an (2) by attempting to alienate any and all funds that might be deposited in Core and Subsurface's names at Century by pledging those funds as security for loans to the two companies in excess of $83,500.00 and then conveying those funds to unknown locations.

Century Bank's response to interrogatories also confirmed Sommer's belief that Subsurface had maintained two substantial accounts at Century for more than two years. However, in May 1991, those funds were transferred out of Century. One account (#8201498) appears to have been Subsurfaces's main operating account from at least February of 1998 until May 1991 (the "Subsurface Operation Account"). The other account (#8201544) was a money market/savings account for Subsurface over the same time period.

Intermingling, Depletion and Concealment of Assets

A preliminary review of Century's records has shown that Monga and Maharaj, Monga's wife, withdrew more than $166,000.00 from the Subsurface Operating Account between January 14, 1991 an May 7, 1991. Of that amount, $46,056.00 was deposited in Monga's and Maharaj's joint personal account at Shawmut by February 11, 1991. (All funds were then removed from the Shawmut joint account by February 15, 1991 (see paragraph 21 below)). In March, April and May 1991, a check for $36,000.00 payable to Monga, a check for $30,000.00 payable to Maharaj an a treasurer's check for $27,000.00, (totalling $93,000.00), all drawn on the Subsurface Operating Account, were deposited into a joint personal account in the names of Monga and Maharaj at National Grand Bank ("National Grand") that had been opened on August 6, 1990. Finally, a Subsurface check payable to Monga for $20,000.00 was deposited into a joint account in names of Monga and Maharaj, d/b/a Fine Arts Resources, at Heritage Bank in Marblehead ("Heritage") that been opened on January 19, 1991.

Discovery and review of some Shawmut Bank records has revealed that the account holding $66.00 on June 13, 1991 (see paragraph 10 above) appears to have been the primary Core operating account (the "Core Operating Account") from January 6, 1989 until May 1991. More than $1,181,000.00 passed through that account in the period of time from June 29, 1990 to May 31, 1991 an the account had maintained an average closing balance throughout that time of approximately $29,624.98. On June 1, 1991, the account opened with a balance $28,257.99. By June 12, 1991, $28,191.85 of these funds had been

transferred out of the account leaving a balance of $66.14.

Furthermore, in addition to receiving their regular salaries from Core from separate payroll accounts during 1990 and 1991, Monga and Maharaj transferred more than $96,200.00 from the Core Operating Account into their joint account at Shawmut in the thirteen-month period of time from January 1990 until February 1991.

Monga and Maharaj had opened their joint account at Shawmut on January 29, 1990 (the "Shawmut Personal Account"). During the year ending February 15, 1991, more than $437,000.00 passed through that account. During the nine-month period of time from April 21, 1990 until January 18, 1991, Monga and Maharaj transferred more than $379,900.00 from this account to five or more other banks, including a joint personal account at the Bank of New England ("BNE"). Thus by January 18, 1991, all but $75.00 had been moved out of the Shawmut Personal Account and transferred by BNE ($22,000.00), Neworld Bank ("Neworld") ($5,500.00), BayBank Middlesex ("Baybank") ($117,626.85), First National Bank of Boston ("FNB") ($6,000.00), National Grand ($130,784.73), and unknown locations. The Shawmut Personal Account was closed on February 19, 1991.

Although the joint personal account at National Grand had been opened on August 5, 1990, there was not much activity in that account until January 11, 1991. Between January 11, 1991 and May 7, 1991, Monga and Maharaj deposited more than

$130,700.00 from their Shawmut Personal Account, $93,000.00 from the Subsurface Operating Account (Century), and more than $74,000.00 from as yet unknown sources into the National Grand account. Between January 22, 1991 and May 8, 1991, Monga and Maharaj then transferred $275,230.00 from the National Grand joint account to a joint account opened at Heritage on January 19, 1991 (see paragraph 23 below) and $40,935.36 from the National Grand joint account to as yet unknown repositories. A final check payable to Heritage on May 8, 1991 closed out the National Grand account.

Between January 19, 1991, the date on which Monga and Maharaj opened the joint account at Heritage, and May 3, 1991, Monga and Maharaj transferred almost $364,000.00 to Heritage. In addition to the $275,230.00 from National Grand, they deposited $30,000.00 from an account opened at the Salem Five Cent Savings Bank (see paragraph 28 below), $120,000.00 from Subsurface's Operating Account (Century) and $38,708.30 from as yet unknown sources. All of that money was transferred through and out of Heritage by May 7, 1991. Maharaj deposited $136,400 from the Heritage account into an account opened in her name at the Brookline Savings Bank. She also conveyed $55,000.00 from the Heritage account to Sharmattie and Sokuldoe Gosines (the "Gosines") who deposited that money in Canada, and transferred $67,962.00 to unknown repositories. On May 7, 1991, Monga cashed a check in the amount of $60,332.91 to close the Heritage account.

Monga and Maharaj also opened a joint personal account at BayBank Middlesex in July 1990. Between July and early November 1990, they deposited $135,626.85 into that account, $117,626.85 of which was transferred out of the Shawmut Personal Account and $17,000.00 of which was transferred from Monga's "professional" account (in the name of "D. Dev Monga, Counselor at Law") at the Bank of Boston. (Monga had transferred at least $23,412.502 from the Core and Subsurface Operating Accounts at Shawmut and Century into his professional account between March and July 1990.) On or about October 1, 1990, Maharaj drew a check in the amount of $52,000.00 on the BayBank account. That check appears to have been deposited in New York City. On December 18, Maharaj withdrew $82,505.00 from the BayBank account and transferred those funds to an as yet unknown location. On December 31, 1990, Maharaj withdrew $2,551.71 in the form of a bank check and deposited that money into Monga's and Maharaj's Shawmut Personal Account. Maharaj closed the BayBank account on January 2, 1991.

On or about July 10, 1990, Maharaj had also opened an account at Neworld. Between July 1990 and November 30, 1990, she deposited into the Neworld account: a check in the amount of $13,000.00 drawn on an account she had opened at Patriot Bank, a check in the amount of $20,000.00 drawn on an account she had opened at the First National Bank of Boston, and $17,205.60 in Core payroll checks. On December 18, 1990, Maharaj closed the Neworld Account with a single check in the amount of

$57,850.88 which she made payable to the Gosines who deposited those funds in Canada.

Based on the information obtained from Century and Shawmut, BNE (now "Fleet"), was served with a trustee summons on August 15, 1991. On August 30, 1991, BNE/Fleet answered that it held only $2,519.06 of Core's funds, $453.59 in the name of Subsurface an nothing in Monga's name, although the defendants had had five accounts at BNE well into 1991. One account had been held jointly by Monga and Maharaj since at least January of 1998 (the "BNE Personal Account") and one had been used primarily for payroll for Core from September 12, 1990 until August 19, 1991 (the "BNE Core Payroll"). Monga and Maharaj transferred more than $52,000.00 (all but $32.32) from the BNE Personal Account between June 3, 1991 and June 11, 1991. By June 12, 1991, the account was overdrawn and contained no funds thereafter. On information and belief, between April 19, 1991 and August 12, 1991, Monga and Maharaj withdrew at least $83,800.00 in addition to their salaries from the BNE Core Payroll account which was then closed on August 16, 1991.

On information and belief, Monga also had an "escrow account" at BNE that he had opened on September 5, 1989 to hold funds that Monga owes to his condominium association pending resolution of his lawsuits with them. Upon information and belief, without informing the Court or the litigants in those matters, Monga withdrew all $6,778.75 in that account on June 10, 1991.

On December 19, 1991, this Court issued trustee summons to Neworld Bank, BayBank, FNB, Heritage, and National Grand. By January 8, 1992, all five of these banks answered "no funds", even though each of these banks had held one or more accounts in one or more of the defendants' names into 1991.

Information obtained from these banks indicates that there are further accounts in the names of defendants and/or Maharaj, including an account opened in July 1990 for Core at the Salem Five Cent Savings Bank (the "Salem Five"). In 1990, $89,923.59 was deposited into that account. In February and March 1991, $45,000.00 was withdrawn from this Core account, $30,000.00 of which was transferred to Monga's and Maharaj's joint personal account at Heritage. Between April 1991 an January 16, 1992, an additional $244,322.55 was deposited to Core's Salem Five account and $262,995.00 was transferred out by January 31, 1992 to as yet unknown locations. $96,995.00 of these Core funds were transferred from this account after the Court's issuance of the preliminary injunction on June 12, 1991 prohibiting such transfers.

I have also learned that Monga further encumbered Core's assets by pledging them as security for a $100,000.00 from the Salem Five on April 30, 1991.

Even based upon the meagre information that Monga has provided to date, it is clear that he has repeatedly violated this Court's preliminary injunction of June 12, 1991 in his continuing efforts

to alienate and conceal his defendants' assets: For example:

On June 20, 1991, Monga opened an account for Core at the Chase Manhattan Bank in Wilmington, Delaware. By December 31, 1991. Monga had transferred almost $103,000.00 into that account.

On June 25, 1991, Monga closed out an IRA account he had maintained at Scudder in Boston, Massachusetts and transferred that $56,682.54 to Founders Fund in Kansas City, Missouri.

On August 7, 1991, Monga took all $23,863.02 from an IRA account he had maintained with Stock Cross in Boston, Massachusetts since at least May 1989, in a "premature lump sum distribution", and transferred those funds to "IRA" accounts with Financial Funds in Denver, Colorado.

On September 6, 1991, Monga opened an account for Subsurface with the Bank of Clayton in Clayton, Georgia with a deposit of $27,208.53.

On September 16, 1991, Monga opened two other accounts for Core at the Delaware Trust in Wilmington, Delaware and by December 31, 1991, had transferred more than $88,900.00 to one and $30,000.00 from the larger account to yet another but unknown location.

In mid-September 1991, Sommer discovered from an ad trade journal that Monga was trying to sell

Subsurface's drill rig, that company's only substantial capital asset. On September 19, 1991, Sommer sought and received a temporary restraining order specifically prohibiting the defendants from selling the drill rig (the "TRO"). The TRO was entered as a preliminary injunction on September 28, 1991. Nonetheless, on information and belief, the drill rig has been leased to John Davies of Everett, Massachusetts.

On or about September 30, 1991, Monga transferred $40,000.00 from Founders Fund in Kansas City to open an account at the Vanguard Morgan Growth Fund in Valley Forge, Pennsylvania.

In September 1991, Monga transferred $10,311.05 in funds from an account at the Provident Institution for Savings in Boston, Massachusetts to establish a Core profit sharing plan for Monga's benefit with the USSA Investment Management Company in San Antonio, Texas.

Based upon my review of the information that have so far obtained, it is readily apparent that Monga and Maharaj have so mingled their respective assets with one another and with Core and Subsurface that only a careful review and control of all of the complete records of each and all could untangle their respective holdings and ascertain their true financial conditions. Also, based upon my review to date it is clear that Monga and Maharaj have fraudulently transferred, conveyed and concealed literally hundreds of thousands of dollars in this case, an in

violation of this Court's preliminary injunction of June 12, 1991.

Refusal to Provide Evidence With Respect to the Defendants' Assets

Sommer initially served a post-trial Request for Production of Documents (the "Document Request) on Monga, Core and Subsurface on June 18, 1991. A copy is attached as Exhibit 1 to my Affidavit of December 18, 1991 ("Dec. Aff."). The response was due to be filed on July 22, 1991.

On June 24, 1991, Monga, Core and Subsurface filed a Motion for Stay of Proceedings pursuant to Rule 62 of the Massachusetts Rules of Civil Procedure (the "Motion for Stay"). (Dec. Aff. Ex. 2.)

On July 17, 1991, the defendants, with respect to the Document Request among other things, served (and on August 5, 1991, filed) a Motion for Protective Order seeking to bar Sommer from any and all "post-judgment" discovery ("First Motion for Protective Order"). (Dec. Aff. Ex. 3.) No response to the Document Request was filed.

On September 10, 1991, this Court denied the First Motion for Protective Order and denied the Motion for Stay "with respect to post-judgment discovery sought by plaintiff." (Dec. Aff. Ex. 4 and 5.)

Sommer learned from an ad in a trade journal that Monga was attempting to sell Subsurface's drill rig.

Subsurface's only real asset. On September 19, 1991, Sommer sought and received the TRO from this Count specifically prohibiting the defendants from selling Subsurface's drill rig.

On September 25, 1991, Monga filed Defendants' Opposition to Ex Parte Allowance of Plaintiff's Invalid Motion for a Temporary Restraining Order. After a hearing, the Court issued a preliminary injunction continuing the TRO in effect.

On October 1, 1991, Monga filed the Defendants' and Plaintiffs in Counterclaim Motion for Reconsideration of [various] Motions, including the TRO. This motion was denied on November 18, 1991.

On September 23, 1991, Sommer served a Motion to Compel Production of Documents responsive to the Document Request (the "First Motion to Compel"), and on September 24, 1991, Sommer noticed Monga's deposition for October 27, 1991. (Dec. Aff. Ex. 6 and 7.

On October 1, 1991, the defendants served (and on October 18, 1991 filed) their Motion for Reconsideration of the Court's denial of a stay of discovery (the "Motion for Reconsideration"). (Dec. Aff. Ex. 8.)

Monga, without notice to Sommer, failed and refused to appear for this deposition on October 7, 1991.

On October 9, 1991, Sommer filed a second Motion to Compel (the "Second Motion to Compel"), this motion requesting that Monga be ordered to appear for the taking of his deposition within ten days, that Monga be ordered to produce all documents responsive to the Document Request at the time of his deposition, and that Monga be ordered to pay $500. 00 as sanction for his non-compliance. (Dec. Aff. Ex. 9.)

On October 11, 1991, the defendants filed in the Appeals Court a "Petition for Relief" from this Court's order of September 10, 1991 denying the [First] Motion for Protective Order. A copy of the Petition, with supporting memorandum, is attached as Exhibit 10 to my December affidavit. At the hearing before the Single Justice of the Appeals Court (Brown, J), Monga admitted that he knows where the defendants' assets are and that he refuses to give that information to Sommer's counsel. The Appeals Court issued an order on October 29, 1991 denying the petition an, finding that "the petition is totally lacking in merit, was not based on good faith, and has been interposed for the purposes of delay and evasion of the legal process", further ordered the defendants to pay Sommer $8,000.00 in damages and costs. (Dec. Aff. Ex. 11.)

On November 7, 1991, this Court allowed Sommer's [First] Motion to Compel. (Dec. Aff. Ex. 12.) Also on November 7, 1991, Monga filed an appeal to the Supreme Judicial Court from the decision of the Single Justice of the Appeals Court.

On November 18, 1991, this Court denied the defendants' Motion for Reconsideration (of the denial of the [First] Motion for Protective Order). (Dec. Aff. Ex. 13.)

On November 31, 1991, this Court allowed Sommer's [Second] Motion to Compel, ordering Monga to appear within ten days for his disposition (with the documents requested in the Document Request) and to pay sanctions of $300.00 within thirty days. (Dec. Aff. Ex. 14)

On November 25, 1991, Sommer noticed Monga's deposition for December 3, 1991. (Dec. Aff. Ex. 15.)

On December 2, 1991, Monga delivered a letter to me stating that he would not attend his deposition on December 3, 1991. (Dec. Aff. Ex. 16.) At that time, I informed Monga that if he refused to appear in violation of this Court's orders, I would seek incarceration for contempt. Monga's response reflected no surprise at the mention of this Court's "orders". Rather, Monga replied, "We shall see, Mrs. Brooks, we shall see."

On December 3, 1991, Monga did not appear for his deposition nor did he provide any documents to Sommer. Instead, he "faxed" a cover letter for a Response to Document Request to me. (Dec. Aff. Ex. 17.) The Response, which arrived subsequently (some six month after the Document Request had been served), enclosed no documents and objected to producing any. (Dec. Aff. Ex. 18.)

There were no communications between Monga and counsel for Sommer, and no other reason of which I am aware, that would explain Monga's sudden and hurried "Response to Document Request" after six month of complete noncompliance and utter silence with respect to that request except that Monga know of the Court's order of November 21, 1991.

As of January 18, 1992, none of the defendants had produced a single document in response to the June 18, 1991 Document Request, and Monga continued to refuse to appear for his deposition, all in intentional, knowing and willful violation of this Court's express orders. On January 18, 1992 I filed a Motion for Finding of Contempt pursuant to Rule 37 (b)(2)(d) of the Massachusetts Rules of Civil Procedure for Monga's failure to comply with the Court's discovery orders.

Efforts to Prevent of Impede Discovery Concerning Assets from Third Parties

In addition to the motions described in part IV of this Affidavit (paragraphs 32-51), Monga filed the following motions in an attempt to prevent Sommer from discovering and securing the defendants' assets through information from third parties.

Motion to Reconsider Allowance of Attachments by Trustee Process on Century Bank and Shawmut Ban, N.A., June 24, 1991, (Jan. Aff. Ex. 8.) Denied September 10, 1991.

July 17, 1991 Motion for Protective Order with respect to interrogatories to Century and Shawmut and a deposition subpoena duces tecum to Eastern Bank (the "First Motion for Protective Order") (Jan. Aff. Ex. 9.) Denied by this Court on September 10, 1991. Appealed to a Single Justice on October 11, 1991 (Jan. Aff. Ex. 10.) Denied by Single Justice on October 29, 1991 with order that defendants pay Sommer $8,000.00 in damages and costs for frivolous motion (Jan. Aff. Ex. 11.) Appealed to Supreme Judicial Court.

Motion to Dissolve Trustees Summonses to Shawmut Bank and Century Bank for Improper Venue. July 17, 1991 (Jan. Aff. Ex. 12.) Denied September 9, 1991.

Motion to Discharge Shawmut Bank as Trustee, July 17, 1991 (Jan. Aff. Ex. 13.) Denied September 9, 1991.

Supplemental Motion to Reconsider Allowance of Trustee Attachment and to Quash Six Summonses (Century and Shawmut) July 17, 1991 (Jan. Aff. Ex. 14.) Denied September 10, 1991.

Motion to Dissolve Invalid Ex Parte Trustee Process Served Upon Bank of New England ("BNE") and to Discharge Void Ex Parte Attachments of Defendants' Accounts Pursuant to M.R.C.P. 42(h). September 9, 1991 (Jan. Aff. Ex. 15.) Denied November 7, 1991.

Defendants' Motion for Protective Order (with respect to trustee summons to BNE and

interrogatories to Fleet Bank/BNE) ("Second Motion for Protective Order"): September 9, 1991 (Jan. Aff. Ex. 16.) Denied November 7, 1991

Defendants' Motion for Entry of Permanent Injunction (to enjoin plaintiff and plaintiff's attorneys from "engaging in deceptive and reckless conduct solely to damage the credit worthiness of Core, Subsurface and Monga," that is their efforts to engage in post-judgment discovery). September 9, 1991. Denied November 8, 1991.

Defendants' and Plaintiffs in Counterclaim Motion for Reconsideration (of various motions, including [First] Motion for Protective Order and Stay [of discovery] Pending Appeal). October 1, 1991 (Jan. Aff. Ex. 17.) Denied November 18, 1991.

Motion to Recuse Judge (Jan. Aff. Ex. 18.) with supporting Memorandum (Jan. Aff. Ex. 19.) and Affidavits of D. Dev Monga (Jan. Aff. Ex. 20.) and Shantee Maharaj (Jan. Aff. Ex. 21) October 1, 1991. Never filed. Withdrawn after completion and service of Opposition and supporting Affidavit (Jan. Aff. Ex. 22, 23, and 24).

Defendants' Ex Parte Motion to Quash Deposition Subpoena (to BNE/Fleet). November 29, 1991 (Jan. Aff. Ex. 25.) Denied except as to identity of defendants' customers. (Todd, J).

Defendants' Ex Parte Motion for Protective Order ("Third Motion for Protective Order"). November 29, 1991. (Jan. Aff. Ex. 27). Denied January 28, 1992.

Defendants' Motion to Enjoin Plaintiff From Using Information Obtained Pursuant to Defective Subpoenas, and for Judge Izzo's Ruling on [k and l above]. December 11, 1991 (Jan. Aff. Ex. 28). Denied January 28, 1992.

Defendants' Motion to Quash Defective Subpoena Duces Tecum Served Upon Dwight Ware. December 16, 1991 (Jan. Aff. Ex. 29).

Motion to Quash Summons to Trustee Served Upon Heritage Cooperative Bank and Defendants' Motion for an Order to Show Cause. December 23, 1991 (Jan. Aff. Ex. 30). Denied January 28, 1992.

Motion to Quash Summons to Trustee Served Upon National Grand Bank of Marblehead and Defendants' Motion for Order to Show Cause. December 26, 1991 (Jan. Aff. Ex. 31). Denied January 28, 1992.

Motion to Quash Summons to Trustee Served Upon BayBank Boston and Defendants' Motion for Order to Show Cause. December 26, 1991 (Jan. Aff. Ex. 32). Denied January 28, 1992.

Motion to Quash Summons to Trustee Served Upon Neworld Bank and Defendants' Motion for Order to Show Cause. December 26, 1991 (Jan. Aff. Ex. 33). Denied January 28, 1992.

Motion to Quash Summons to Trustee Served upon First National Bank of Boston and Defendants' Motion for Order to Show Cause. December 26, 1991 (Jan. Aff. Ex. 34). Denied January 28, 1992.

Defendants' Motion to Enjoin Plaintiff From Continuing to Engage in Post Judgment Discovery. January 3, 1992. Denied January 28, 1992.

Defendants' Motion to Stay Discovery Until the Trial Court Rules on Related Pending Motions, and Until the Supreme Judicial Court Rules on Defendants' Appeal Concerning Post-Judgment Discovery. January 13, 1992 (Jan. Aff. Ex. 35). Denied January 28, 1992.

Defendants' Objections to Plaintiff's Taking of Depositions and Requests for Production of Documents from Heritage Cooperative Bank, First National Bank of Boston, National Grand Bank of Marblehead, BayBank, and Neworld Bank. January 13, 1992. Tabled.

In sum, by January 21, 1992, Monga had filed over twenty-five motions seeking to prevent post-judgment discovery, generally raising the same issues, and relying on the same grounds. On January 21, 1992 I filed a Motion for Preliminary Injunction Prohibiting Monga from filing further repetitive and vexatious motions.

Recent Developments

On January 23, 1992 the Court issued an order setting all pending motions for hearing on January 28, 1992.

After a lengthy hearing, held on January 28, 1992, the Court denied all of Monga's pending motions and allowed Sommer's Motion for Preliminary Injunction prohibiting Monga from filing further motions in an effort to obstruct discovery without leave of the Court and from threatening , harassing, or interfering with third parties (such as banks) from whom discovery is sought. The Court also ordered Monga to appear for his deposition on January 31, 1992 at the Courthouse and to pay not only the $300.00 sanction ordered on November 21, 1991 (see paragraph 46 above) but also ordered an additional $1,000.00 in sanctions. Monga has paid these amounts. Sommer's Motion for Contempt is "pending and continued generally."

On January 31, 1992, Monga appeared at the Middlesex County Superior Courthouse for his deposition. He did not, however, bring with him the great majority of the documents he was ordered to produce. Monga testified at that time that he has no bank accounts, nor is he a signatory on any and that he cannot recall where any of the defendants' assets are. He refused to answer questions concerning Maharaj's assets claiming husband-wife privilege and refused to answer any questions about Subsurface assets claiming that he filed for bankruptcy for Subsurface that morning.3 In response, Sommer's counsel sought an immediate hearing before the Court. A copy of the transcript of

that hearing is attached as Exhibit 6 hereto ("Transcript").

At the January 31, 1992 hearing, the Court ordered Monga to answer all questions relating to Maharaj's assets and to the fate of various large checks from Subsurface and Core made out to her. Transcript at 16 and 19. The Court further ordered Monga to produce not only the documents he had brought with him that day but also all other documents that Sommer had requested, and that Monga do so at the offices of Sommer's counsel within seven days. This Monga did not do. Instead he provided copies of only some of the documents he had with him in Court. Even these records are incomplete and some appear to have information whited out. As of today Monga has never provided the bulk of the material requested almost one year ago, and which he has been ordered to produce since November 7, 1991. For example, he has not produced any checks or checkbooks for any accounts and he has produced no documents at all for vast majority of the more than sixty accounts I know to exist.

On May 18, 1992, I noticed the depositions of Monga, Maharaj, Walter Worden, Core, and Subsurface for May 27, 28 an 29, and June 2, 1992.

I received two letters from Monga dated May 22, 1992 (attached hereto as Exhibits 7 and 8) in substance refusing to attend the depositions. I responded by letter dated May 27, 1992 requesting new dates by June 4, 1992. A copy is attached hereto as Exhibit 9. As of the close of business on June 4,

1992, I had no communication from Monga. It should be noted that Monga continues to refuse to attend depositions based on his argument that these depositions should be taken pursuant to Rule 27 of the Massachusetts Rules of Civil Procedure. That argument has been repeatedly rejected by this Court in denying some of Monga's earlier motions seeking to halt Sommer's discovery (see, e.g. paragraphs 52 (u) and (v) above).

Finally, with respect to the depositions I seek from Maharaj and Walter Worden, I received a letter dated June 1, 1992, which is attached hereto as Exhibit 10, denying service of the subpoenas.

It is also worthy of note that Monga's own original signatures appear on correspondence mailed from Peabody on the date written although Monga "is out of state on business."

On information and belief, Monga has had repeated communications directly with another legal adversary but refuses ever to give a return telephone number. He has failed to appear for a number of Court dates in various cases, including trial in Federal Court cases pending with his condominium association. Monga has recently filed for a motion for protective order seeking to halt our discovery (depositions) in the related reach and apply action we have brought and has asked that that court decide the motion on the papers without hearing because he is unavailable.

On information and belief, no one I know has been able to reach Monga at the officers of Core and Subsurface as he claims always to be "out of state on business." On information and belief, no none has been able to reach Monga at his residence in Marblehead. Also on information and belief, Maharaj and Walter Worden appeared at the Marblehead residence several weeks ago in the dead of night, and without turning on any lights, began to move items out of the residence. They were discovered by neighbors when there was an attempt to tow the motor vehicle in which they arrived.

Signed under the penalties of perjury this 8th day of June, 1992.

"s/Cathy P. Brooks"
Cathy P. Brooks

CERTIFICATE OF SERVICE
I certify that a true copy of the
above document was served upon
the attorney(s) of record for each
party by overnight mail on June 10, 1992.

"s/Cathy P. Brooks"

1 At a deposition taken on January 11, 1992, Monga claimed that he could not remember what was done with the load proceeds.

2 I have reason to believe that at least $13,500.00 more was conveyed to Monga's professional account during that period but do not as yet, have the documentary substantiation.

3 The Bankruptcy Court dismissed the case on May 22, 1991.

APPENDIX DD

Massachusetts Superior Court
CA. No. 89-2951,

Dated June 12, 1991

SOMMER'S MOTION FOR ENTRY OF PERMANENT INJUNCTION

COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX. SS. SUPERIOR COURT
DEPARTMENT OF THE TRIAL COURT
CIVIL ACTION NO. 89-2951

June 12, 1991

PLAINTIFF'S MOTION FOR THE ENTRY OF PERMANENT INJUCTION

PAUL F. SOMMER, Plaintiff
v.
D. DEV MONGA, ET AL)
Defendants

The plaintiff Paul F. Sommer ("Sommer") hereby moves for the entry of a permanent injunction against the defendants D. Dev Monga, Core Environmental & Engineering Resources, Inc., and Subsurface Technologies, Inc. restraining and enjoining each of the defendants from selling, assigning, transferring, encumbering or otherwise disposing of any of their real or personal property, other than in the ordinary and usual course of business, until the judgment in this matter has been satisfied or has been vacated.

As grounds for his motion, Sommer states:

1. On June 7, 1991, the jury returned a verdict in favor of Sommer in an amount totaling approximately $478,000.00. With pre-judgment interest on the breach of fiduciary duty claim and the assessment of costs, the judgment to be entered pursuant to that jury verdict will be in the amount of approximately $550,000.00. Assuming an appeal of the judgment by the defendants and the continuing accrual of post-judgment interest, it is likely that the execution that will be ultimately issued by this Court will be in the amount of approximately $700,000.00 against all of the defendants.

2. There is a substantial risk that the defendants will hide, conceal or otherwise dispose of their assets to avoid satisfying the judgment entered in this action. The verdict of the jury confirms the animosity of the defendants toward the plaintiff and suggests that the defendants will avoid satisfying the judgments in this action at all costs.

3. The injunction will not unduly interfere with the personal or business activities of the defendants, as the injunction only would prohibit the bulk or unusual transfer of assets and would not interfere with the defendants' ability to continue in business.

For the foregoing reasons, Sommer requests that the Court enter a permanent injunction restraining the defendants from disposing of their assets other than in the normal course of business until the judgment has been satisfied or vacated.

By his attorneys,

"s/Peter S. Brooks"
Peter S. Brooks
B.B.O. #058980
Brooks & Brooks
20 North Main
Street
Suite 200
Sherborn, MA 01770
(508) 653-9275

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney(s) of record for each other party by mail on
"s/ 6/12/91"
"s/ Peter S. Brooks"
Peter S. Brooks